

~~SOME~~ *W. H. Jones*
CONSIDERATIONS
ON THE
LAW OF FORFEITURE,
FOR
HIGH TREASON:

OCCASIONED BY
A CLAUSE in the late ACT, for making it Treason to
correspond with the Pretender's Sons, or any of their
Agents, &c.

WITH
An APPENDIX, concerning Estates-Tail in
SCOTLAND.

By the Hon. CHARLES YORKE.

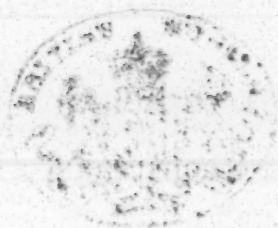
*Sicut pecunia, nave, milite, vim exteram, ita Majestatis Legibus
intestinarum arcemus.* Gravin. de Leg. Rom.

THE FOURTH EDITION.

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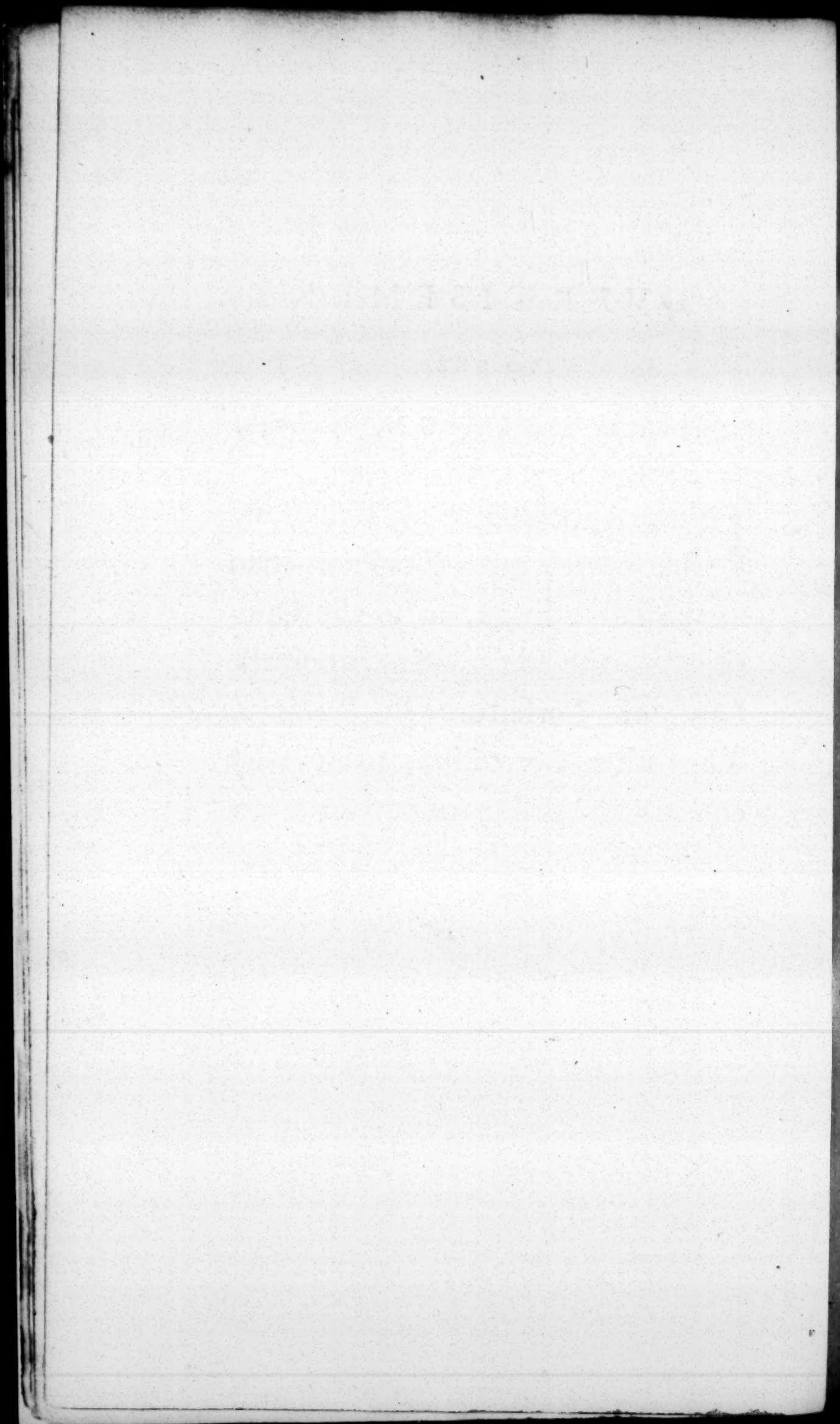


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TO THE

THIRD EDITION, in 1748.

IN the Appendix, some Things are stated with more Exactness than in the last Edition, as to the Operation of the Stat. 7 *Ann.* upon the Law of Forfeiture in *Scotland*. The other Corrections principally concern the Stile; except in a few Places of the Discourse, which are enlarged.



ADVERTISEMENT
TO
THIS EDITION.

THE Attention of the Public has been recently engaged by Prosecutions for the Crime of High Treason. The Lenity of the Law of *England* upon this Subject has always been acknowledged, and the Temper with which it has been administered must have made the strongest Impression upon every liberal and enlightened Mind.

The Terrors that have been so wisely spread round the Throne for the Prevention and Punishment of Treason, are intended as much for the Security of the Subject as for the personal Safety of the King, every
a Prero-

Prerogative that is vested in the Crown being in truth a Provision for the Stability of the Constitution.

The First Edition of the Considerations on the Law of Forfeiture was published in 1745, and undoubtedly was received with peculiar Interest from the Circumstances of the Times.

The Third and last Edition was printed in 1748, and it is from a corrected Copy of that Edition that the present is reprinted. Though the Point which it is the Object of this Treatise to establish is more immediately connected with the Events of a Period that is past, many of the Reflections that arise from it are of general Application, and delivered rather with the sedate Impartiality of an Historian, than with any Reference to temporary Politics. This singular Spirit of Moderation, as well as the strict Manner of arguing that is preserved

preserved through the Whole, and the classical Purity of the Stile, may possibly render it not unacceptable to the Profession, and to that Class of Readers for which it was originally intended.

Under these Impressions, divested of every Partiality which might arise from the Nearness of his Connexion, the Editor of the present Edition is convinced, that in adding to it the Name of the Author, he does honour to his Memory.

THE
PREFACE
TO THE
FIRST EDITION
OF THE
HISTORY OF THE
CITY OF
NEW-YORK
BY
JOHN B. HENRY

THE
HISTORY OF THE
CITY OF
NEW-YORK
BY
JOHN B. HENRY
PUBLISHED BY
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1846

C L A U S E S

EXTRACTED FROM THE

ACTS of PARLIAMENT,

More particularly referred to in this
TREATISE.

*Stat. 7 Annæ, Cap 21. intituled, " An
" Act for improving the Union of the
" Two Kingdoms."*

*WHEREAS nothing can more conduce
to improving the Union of the Two
Kingdoms, which, by her Majesty's great
Wisdom and Goodness, hath been happily ef-
fected, than that the Laws of both Parts of
Great Britain should agree as near as may
be ; especially those Laws which relate to
High Treason, and the Proceedings thereupon,
as to the Nature of the Crime, the Method of
a 3 Prosecution*

Prosecution and Trial, and also the Forfeitures and Punishment for that Offence ; which are of the greatest Concern, both to the Crown and to the Subject : To the end therefore that the said Union may be more effectually improved, Be it enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, That, from and after the First Day of July, in the Year of our Lord One thousand Seven hundred and Nine, such Crimes and Offences, which are High Treason, or Misprision of High Treason, within England, shall be construed, adjudged, and taken to be High Treason, and Misprision of High Treason, within Scotland ; and that, from thenceforth, no Crimes or Offences shall be High Treason, or Misprision of High Treason, within Scotland, but those that are High Treason, or Misprision of High Treason, within England.

[Then follow several Clauses relative to the Manner of Prosecution and Trial ; and, after them, it is said !,

Be

Be it further enacted, &c. That, from and after the said First Day of July, in the said Year of our Lord One thousand Seven hundred and Nine, all Persons convicted of High Treason, or Misprision of High Treason, in Scotland, shall be subject and liable to the same Corruption of Blood, Pains, Penalties, and Forfeitures, as Persons convicted of High Treason, or Misprision of High Treason, in England.

Provided always, That, where any Person now is, or shall be, before the said First Day of July, seised of any Messuages, Lands, Seigniories, Rents, Tenements, or Hereditaments, in Scotland, that is to say, an Estate-Tailzie, affected with Irritant and Resolutive, or Prohibitive Clauses, and is, or before the said First Day of July shall be, married, if any Issue of that Marriage be living, or there be Possibility of such Issue at the Time of the High Treason committed; that then, in such Case, the said Messuages, Lands, Seigniories, Rents, Tenements, and Hereditaments, shall not be forfeited upon the Attainder of such Person for High Treason (but during the Life of the Per-

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son so attainted only), so that the Issue, and Heirs in Tail of such Marriage, shall inherit the same.

[Then follow other Provisions, relating to the Method of Trial, and the Offences to be adjudged, or not adjudged, High Treason in Scotland; and, after them, it is said],

Provided always, and be it further enacted, by the Authority aforesaid, That, after the Decease of the Person, who pretended to be Prince of Wales, during the Life of the late King James, and since pretends to be King of Great Britain, and, at the End of the Term of Three Years, after the immediate Succession to the Crown, upon the Demise of her present Majesty, shall take Effect, as the same is, and stands limited by an Act made in the First Year of the Reign of his late Majesty King William the Third, intituled, "An Act for the further Limitation of the Crown, and better securing the Rights and Liberties of the Subject," no Attainder for Treason shall extend to the Disinheriting of any Heir, nor to the Prejudice of the Right or Title of any Person or Persons, other than the Right or Title
of

of the Offender or Offenders, during his, her, or their natural Lives only: And that it shall and may be lawful for every Person or Persons, to whom the Right or Interest of any Lands, Tenements, or Hereditaments, after the Death of any such Offender or Offenders, should or might have appertained, if no such Attainder had been, to enter into the same.

*Stat. 17 G. II. C. 29. intituled, "An Act to
" make it High Treason to hold Corres-
" pondence with the Sons of the Pre-
" tender to his Majesty's Crown; and
" for attainting them of High Treason,
" in case they shall land, or attempt to
" land, in Great Britain, or any of the
" Dominions thereunto belonging; and for
" suspending the Operation and Effect of
" a Clause in the Act of the Seventh Year
" of the late Queen Anne, for Improving
" the Union of the Two Kingdoms, relating
" to Forfeitures for High Treason, until
" after the Decease the Sons of the said
" Pretender."*

*Section 3. And whereas, in and by the
said recited Act of the Reign of her said
late*

late Majesty Queen Anne, it is provided and enacted, That, after the Decease, &c. [as above] Be it further enacted, by the Authority aforesaid, That the said Proviso so made, by the last-recited Clause, shall not take place, nor have any Operation, Force, or Effect whatsoever, until after the Decease, not only of the said Pretender, but also of his Eldest, and all and every other Son and Sons.

C O N T E N T S.

INTRODUCTION, concerning the Affection of the People of England towards their antient Constitution of Government in all its Parts; their Aversion even to plausible Innovations; yet that it is expedient, in a free Country, to explain the Grounds of Measures, seemingly severe, though taken in Support of the antient Constitution, and founded on its Principles.

p. 1—7

State of the Question, cleared of Circumstances not belonging to it, which have sometimes been blended with it; affects no Natural Rights or Civil Liberties of the Posterity of attainted Persons; only the Civil Rights of the attainted.

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General Reflections on the Imperfection of Human Punishments applied to this Question.

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I.] The Question argued, from Principles of Reason, Justice, and Policy, separate from the Consideration of any particular Municipal Laws.

The fundamental Proposition laid down, That the Right of Inheriting is the Creature of Civil Society: The Consequence drawn, That Society may bestow that Right upon Conditions best suited to its own Exigencies.

p. 11—13

The Proposition proved against those, who think the Right of Inheriting derived from Nature:

The Law of Nature defined; its Principles laid down, as to the End, Acquisition, and Transferring of Property:

The

The Operation of these in a State of Nature; the Consequence drawn, that there could be no Right of Inheriting antecedent to Civil Institutions :

Supposing there were such an antecedent Right,

1. *Either unnecessary, or ineffectual to the End proposed, the Benefit of a Man's Children :*

2. *Would charge the greatest Absurdities on the Laws of all Countries.*

p. 13—21

This Right instituted by Civil Society, upon Reasons of general Convenience, which have no Relation to the Children as such; the Consequence drawn, that Reasons of a like Nature may account for the Interruption of it: And proved against those, who admit it to be instituted by Society, and yet suppose, that the great End of it was the Benefit of a Man's Children, to be attended, on their Supposition, with great Absurdities in the Manner of instituting it;

1. *From the Extent, to which it is carried in one Respect, and the Boundary set to it in another :*

2. *From its being equally ineffectual to the End proposed in a State of Society, as of Nature; and more unnecessary :*

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The same Reasoning, which holds for the Father's Power of Alienation by Sale or Gift, concludes for Alienation by Forfeiture.

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The Forfeiture of Honours, though not alienable by him who enjoys them in England, distinguished from that of other Property:

Shown to stand upon its own Reasons.

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The Interruption of Descent proceeding from the Interposition of one attainted between an Ancestor or an Heir, more remote in Degree than him attainted, called Corruption of Blood, explained to be, in point of Reason, a necessary Consequence of the Law of Attainder.

p. 30—34

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- *Of the Athenians ;*
- *Of the Romans ;*
- *From the Law of Feuds :*

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The great Principles of the Feudal Policy stated :

Cleared of adventitious Circumstances, which, in different Countries, have corrupted it ; and shewn to be free :

A Policy resembling it subsisted in England before the Conquest :

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Made no Alteration in this Sanction of the Law of Treason :

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Objection, That in England the Policy is a Fiction, and the Reason of it ceased with the Military Tenures, answered ;

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Switzerland,

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Objection, from the Nature of a mixed Government :

Answered from the same Topic of Argument considered more exactly.

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Craig's Opinion, That an Estate descending from a Father to an attainted Son, ought, instead of escheating to the Crown, to go immediately to the Father from the Collateral without Notice of the Attainted, or his Heirs, refuted ;

(1.) *From*

- (1.) *From a general Principle of Policy in all States ;*
- (2.) *From the Policy of the Common Law of England ;*
- (3.) *From general Convenience.*
- 3. *Honours by Tenure.*
- 4. *Dower.*

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(II.) *By the Law of England ;**The Prerogative of the Crown in Forfeiture, and the legal Notion of it :**This Law pursued in every Instance as the Feudal Law ;*1. *Goods and personal Things.*2. *Lands, particularly of the Forfeiture of Estates Tail ;**Difference between them and Estates in Fee-simple, as to the Effect of Attainders upon them, founded on what Reason ;**Objection from Analogy, That the Law of impeding Descents has been altered as to Aliens ; so it may be in Treason ; answered from the Points of Difference between the two Cases :**The Regard, which our Law has to this Part of the Law of Forfeiture :**Advantage, which it has over the Feudal Law :*3. *Honours, by Tenure, Writ, and Patent :*4. *Dower ; considered differently in the Law of England and the Feudal Law :*

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*Objection to the impeding of Descents by Corruption of Blood, as depending not on natural, but artificial Principles, answered,*1. *From the general Principles of the Laws of Descent :*2. *From the Nature of legal Construction :**General Absurdities flowing from the Proviso in Stat. 7th Queen Anne, c. 21. by which the Offender can forfeit a Real Estate only for his own Life :**Particular Absurdities as to the late Act concerning the Pretender's Sons, which would have followed upon suffering that Proviso to take place at the Time of the Pretender's Death.*

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(2.) *As to the Tryal:*

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(I.) *Shewn in one Light (as it concerns private Men, and the Ministers of the King), not to be true in Fact;*

1. *From the general Notions of the Law, as to public Crimes;*

2. *From the Cases included in the Stat. 25 Edw. III.*

(II.) *Shewn in another Light (as it concerns the King himself), to contradict or mistake the Principles, on which the Constitution is framed;*

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Objection drawn from the Temptation given to Ministers, to abuse the Power of exacting this Forfeiture, answered,

1. *Particularly, from the Policy of Government, introduced by the Revolution.*

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A Question asked, Suppose there had been no Forfeiture by the antient Constitution; would it have been thought right to institute it now? answered. p. 131, 132

Objection, The Terrors rising from it is so great, that Resistance to bad Governments will become more difficult than the Principles of Liberty allow;

Answered at large;

1. *That*

1. *That the Abolition of this Forfeiture will be unsafe to good Governments ; and the Continuance of it not deter a justifiable Resistance to bad :*

2. *That the Objection proceeds from erroneous Notions, both in respect of common Experience, and the Nature of Law :*

3. *That the Abolition will not attain the End proposed by it, the Protection of the Estates of honest Men in Civil Troubles.*

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Conclusion, applied to the peculiar Necessity of these Times.

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A Discourse.

p. 191—238

SOME
CONSIDERATIONS
ON THE
LAW OF FORFEITURE, &c.

THE People of *England* have ever entertained so high a Veneration for their Form of Government, as to submit to it with an Acquiescence, equal to that Ardour, which they have shewn in the Defence of it. To this Felicity of Temper and Conduct it is owing, that their groundless Jealousies soon die away, when they find the Ministers of State pursuing strictly the Spirit and Intention of the Law of the Land; which is acknowledged in every Instance to be the best Rule, however opposite to transient Opinions, or momentary Wishes. The

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Prerogative itself, though in the antient Exercise of it scarce to be distinguished from Tyranny, yet circumscribed by that Rule, has been esteemed of general Advantage; and those great Men, who asserted our Liberties, at the Beginning of the Civil Wars, meant nothing more than to reduce it to its just Bounds, without a Thought of offering the least undue Violation to it. In Resumptions, which have been strong Legislative Acts to rescind Grants made by the Crown, to the Disgrace of him who wore it, a Saving was always expressed to the Royal Power of Granting in the most unquiet Times. The Conduct of the House of Lords (a Body, whose Privileges have been the Source of Jealousy), as to the Case of the *Aylesbury* Men in a late Reign, when the Two Houses of Parliament appealed against each other to the Throne and to the Public, gained the Applause of the People, even against that great and deserved Favourite, their own Representative; because that House acted in Support of legal Rights, and the antient Jurisdiction of Parliament. These Instances prove, that, well knowing the Wisdom of their Ancestors in modelling the Constitution, with an admirable Equality, the People were
desirous

desirous to transmit it down to their Posterity, as a Thing sacred and unalterable. In this they proceeded on the tenderest Regard to the Welfare of the Realm, and to a Truth too often experienced in our History, that when old Foundations are weakened, or Landmarks removed, though with plausible Designs to secure or extend Liberty, the *English* Subject is a Loser by every Innovation.

But the Heat of honest Men being once raised, and the cooler Passions of artful Men dissembled by a specious Zeal for public Good, the calm Voice of Reason and the Law finds no Attention ; and Persons of less Understanding, incited by Example, add greatly to the Weight of that Clamour, which, for a Time, has ever been too strong for Argument. Nor in these last is it to be wondered at, since enlarged Views are requisite on Matters of General Concernment, which few are enabled to form either by Nature or Education, and from which more are called off by the nearer Prospect of a narrow and imaginary Self-interest. As the worst Evils of Society flow from short-sighted or perverted Judgments, the Constitution, with a Policy peculiar to itself, encourages every Method of

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popular

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popular Instruction. A Freedom of Debate in Parliament tends to clear and lay open the Grounds of public Proceedings; and the Liberty of the Press is as naturally fitted to the Support of good Government, as to the Ruin of bad. Measures, that carry with them a fallacious Appearance of Lenity, are exposed by this Means; and those, which carry with them the Form of Severity, but have the Substance of Strength and Safety, are set in their just Light for the Approbation of the People. In the last Case, such Instruction is a Matter of Necessity; because whatever has the Air of Severity, is seemingly repugnant to the Genius of a free Government, and ungrateful to generous Minds; above all to *Englishmen*, trained in the Principles, and celebrated for the Exercise of Humanity. Besides, in an Age fond of Liberty, but impatient of those salutary Restraints of Law, which alone make Liberty either lasting or valuable, it is natural to suppose that some would be for throwing down the Fences, which may controul irregular Attempts; and therefore, no Wonder, if such as mean to repair and keep them in Order, should become the Object of their Censure. That Censure ill-understood, and
not

not properly refuted, might make an Impression, and overcome the national Affection for the Law, if coloured by fair Pretences; especially, if receiving Strength from the concurrent Sense of the Patrons of Liberty, who have declared against the Multiplication of Penalties; tho' it be one Thing to multiply and extend them, another to maintain those Terrors, which have been, in all Times, esteemed the Safeguard of Government. One principal Terror of this Kind, it is the Argument of this Book to vindicate; the Forfeiture of Inheritances for High Treason. That is a Safeguard, with which every well-regulated State, whether built on Maxims of Monarchy or Freedom, has ever been provided, and without which it were liable to perpetual Disorder from the desperate Sallies of Resentment, on the daring Projects of Ambition. Here too our own Constitution preserves its usual Excellence; and, being framed with much Wisdom and Equity as to the Crime of Treason, it seems difficult to account for the Conduct of those, who, in the Parliament of the 7th of Queen *Anne*, were for abolishing that Punishment of the Crime, which has subsisted for Ages past, is interwoven with the first Principles, and intimately

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timately connected with the Foundations of our Policy. The greatest Men of the Time opposed it in the House of Lords; and, when the Temper of the Commons was such, that they would not have passed the Bill, which was of great Moment to *Scotland*, without the Clause to abolish the Forfeiture of Real Estates in Cases of High Treason, the Lords very artfully proposed an Amendment to suspend its Operation, persuaded that the Prudence of succeeding Parliaments would take occasion to repeal it. The same Debate revived in the last Session, and the Bill for making it Treason to correspond with the Pretender's Sons, or any of their Agents, has carried that Suspension to a probably remoter Period, by an Addition made in the same House, and approved in the other. Nevertheless, even this gentle, and almost necessary, Alteration, to give Life and Vigour to the Law, in a Juncture the most critical, created a Dissatisfaction in some Minds, of which it may not be unseasonable to examine the Grounds. Indeed, it has been represented with so many Consequences of Terror, that it requires a better Authority than that of a private Writer, to explain the Reasonings, on which it stands. In the
mean

mean time he hopes it may be allowed him to speak what he thinks the Truth; and, with Deference to those who have received contrary Prejudices, to shew, that, in this Instance, they forget both a becoming Reverence of their Ancestors, and Care of their Posterity.

In entering upon the Argument of the Forfeiture of Inheritances, it will be said, It is a strange Endeavour, to defend that, which is inconsistent with the first Principles of natural Justice; and therefore, whilst an Objection, that touches the *jugulum causæ*, is not removed, Arguments from Policy, and the concurring Practice of Nations, come too early; and must be considered as weak artificial Reasoning, opposed to the strong natural Dictates of Sense.

But why contrary to Justice? The Answer is, that "The innocent Posterity ought not to suffer for the guilty Ancestor."

It is not to the Purpose of this Essay to attempt a Justification of any Instances, in which the Laws of Forfeiture may, in some Countries, have been carried to an Extre-

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mity, as little to be reconciled with Principles of Policy, as of Clemency or Justice. Among the *Persians* and *Macedonians*, not only the Criminals, convicted of Treason, were put to Death, but all their Relations and Friends. The Descendents of *Antiphon* the Orator were disqualified from advancing themselves, by their own Merit, to Estates and Offices in *Athens*. The Posterity of *Marius's* Faction were excluded by a Law of *Sylla* from the same Privilege.

When Forfeitures and Incapacities of this Kind are laid out of the Case, what is the Force of the Answer, as applied singly to the Question of Estates or Rights of Inheritance, enjoyed by the Criminal himself, or to be conveyed through him to others? It clearly results into this Absurdity; That Rights concerning Property, manifestly derived, not from Nature (as will be shewn at large), but from the Favour of Civil Society, may not be conferred upon such Terms as shall bind the Possessor to that Civil Duty, which he owes the State conferring those Rights; and, for the Breach of his Duty, be subjected to Forfeiture.

But

But this is to offer strange Violence, both to the Constitution of Society, and the Conclusions of Reason.

If we consider accurately the Nature of human Punishment, we shall find it attended with unavoidable Imperfections.

How short is our Discernment! The Surface of Things and Actions is alone exposed to our View: The inward Thoughts, the habitual Temper, which form the greater Part of moral Conduct, are entirely concealed from us. It is for this Reason, that Laws assign the same Name, Nature, and Penalty, to all Offences, which bear a Conformity in outward Resemblance, though intrinsically varying from one another by a thousand Circumstances, known only to the Searcher of Hearts.

How much shorter is our Power! We can estimate the Offence more exactly than we can proportion the Punishment. In regard to a Man's self, Death is the last Punishment, which can be inflicted for the most malignant and extensive Crimes. But in regard to
others,

others, this Power, limited as it is, minutely traced into its Consequences, operates perhaps further than we wish; since in no Case can it be confined to the Criminal, without reaching beyond him to some connected with him by Friendship, Interest, Consent, or Nature. What is still more, it is not only impossible to disjoin these Connections; but, however that were possible, it is even necessary to complicate them. Society was founded on this Necessity; it is likewise supported, even whilst it suffers, by it; and when they are thus complicated, whatever happens to One, must be mutual to All. In the Instance of a King and his People; a King executes by his Subjects, and, in Quarrels with Foreign States, they suffer various Evils, for the Weakness or Iniquity of his Government. In the Case of a Corporation; the Sense of the Majority, or of a chosen Number, ordinarily determines the Body. On account of Faults committed in their Corporate Capacity, their Markets, Gates, Fortifications, Harbours, are liable to Forfeiture; and yet many innocent Members may suffer in the Effect of such Forfeiture.

To

To the First of these Cases it will be said,
“ That Princes own no Superior; and,
“ therefore, in Contests with one another,
“ cannot be separated, for the Purposes of
“ Justice, from their People.” To the Second, “ That though the guilty and innocent Members of the Corporation are under the same Sovereign Authority, and might be discriminated; yet the Corporate Body cannot be punished for wrong Acts, but by the Loss of those Privileges, which extend to all. But, in the Case of Father and Children, the Discrimination might easily be made, and Justice satisfied: Yet the Father commits Treason, and forfeits that Estate, which probably might have descended to his Children.”

It may be answered, in the First Place, That this Punishment, being a Pillar of Society, agreeably to the Genius of the whole Edifice, is erected on the great Principle of Society itself, namely, to make the natural and social Affections a Controul upon irregular and selfish Passions. In the Next, that nothing is a Punishment, which does not affect a Right, strictly so called. To make the
Innocent

Innocent suffer for the Guilty, and to inflict that on the Guilty, which, in its Consequences, may affect the Innocent, are very different and unequal Considerations. "Every thing, says *Puffendorf**, which causes a Sorrow or Loss, is not properly Punishment. It is a Misfortune to be reduced to Poverty by a Crime, which caused the Magistrate to set a large Fine upon the Father of a Family; but not a Punishment. How many are there, who come into the World without the Expectation of a Patrimony? How many, who lose all they have by War, Fire, or Shipwreck?" —Now, since the Children have no Right but from the Father, if he holds the Property till his Death, or through him, there is no Injury done, when he is justly deprived of that Wealth, which was acquired under the Protection of Society, to be transmitted to his Posterity in stated Rules of Descent by Positive Institution; and of those Honours which are the Rewards of good Conduct, the Pledges of future Faith. These Benefits may be considered as the Gifts of Civil Government; but Life and Liberty are the Gifts of Nature, and should never be

* *L. viii. c. 3. §. 30.*

taken away because of the Parent's Offence: Nor should a Subject be made incapable of Employments, without some Crime committed by himself. Such Severities are unwise, as well as unequitable. A Difference therefore must be observed between the natural Rights and common Liberties, which are annexed to the Person of every Subject, and the peculiar Distinctions of Society, such as Riches and Honours. These last are merely contingent; and, if hoped for in the Course of Succession, depend on the Conduct of those Ancestors from whom we would derive them. And it is not to be said, Men are punished, when these contingent Advantages, which themselves neither acquired nor merited, having, by reason of the "civil Qualification of their Blood" (as a great Lawyer * of our own has expressed it), been brought into View by the Desert of one Ancestor, are intercepted by the Crimes of another.

If it be thought, that what is here said is built on a Mistake, and that "the Right of Inheriting is conferred by the Law of Nature, anterior to Civil Society;" it may seem proper to shew the contrary, with as

* Lord Chief Justice *Hals.*

much

much Clearness and Brevity, as the Matter will admit; the rather, because the greatest Writers on the Natural Law are extremely perplexed upon it, and have found it difficult to free their Reasoning from Ambiguity of Words, mutual Cavils, and the Prejudices arising from Civil Policy. The Law of Nature is used in two Senses; either as consisting of certain Regulations absolutely necessary for supporting the Purposes of Nature, and Constitution of Things, previous to all Civil Compact; or as made up of those Conclusions of Natural Reason, which different States or Civil Societies have generally and uniformly thought fit to establish into Laws by voluntary Consent. The first is the only strict and genuine Description of the Law of Nature; and, taking it in that Light, it may be said, that altho' the Right of inheriting be known to the Laws of every civilized Country, and is founded on the best Principles of Natural Reason, yet it is not a Right of Nature, or which can belong to any Man in a State of Nature. To illustrate the Proposition particularly, let these Things be considered, 1. That the End of Property is Subsistence, by which End Nature has bounded our Pretensions to it, how-

ever Civil Society may enlarge them. Hence, in a State of Nature, we cannot assume more than we use, nor hold it longer than we live, and are capable of using it. And in this no Alteration arises from Circumstances of Improvement. It is enough, that the Thing improved becomes more advantageous to ourselves, and that we pay to Nature the Acknowledgments of Industry for the liberal Profusion of her Gifts. 2. That the Manner of acquiring Property, in a State of Nature, is by Occupancy; an Act of the Body, not of the Mind; which last, expressed in any other Way (until Civil Laws had marked out for Words or Writing a settled Operation), would give a Title to Property too precarious and disputable. 3. That in the transferring of Property, the Consent expressed gives a Right to the Alienee against the Alienor; and Occupancy confirms that Right against every one else. But in the Case of Descent, where is the Expression of Consent in the Alienor? It will be said, That the Affection and Relation of the Deceased will create a Presumption of Consent. This is carrying the Matter very far, to say, that the Law of Nature, in a State of Nature, transfers Property by Presumption,

sumption, in like Manner as a Civil Law in a State of Society. Where is the Occupancy to complete the Transfer? That Title may accrue to some other more diligent than the Heir, unless we will suppose Nature so careful as to keep Possession for him. In a Word, is it not more rational to say, that Transmiffion by Descent, or Acquiring by Inheritance, is that Act of Positive and Civil Law, which prevents the Property of the Deceased from reverting, as it would do in a State of Nature, to the common Stock? But it may be objected, That this Manner of arguing sets the Principles of Nature at Variance with one another: She expects from every Man the Nourishment of his Children, till they are able to support themselves. If he should die before that Period, will she not assist him to complete his Views by transferring his Property to them? The Answer is obvious. Upon the Principles here mentioned, Nature points out another Way. If he foresees the Event of his Death probable, he may make * conditional Gifts and Alienations

* The Writers on the Law of Nature speak of the Right of making Donations *mortis causâ* (a Thing known in the Civil Law), as a Right, which might subsist in a State of Nature. And for a plain Reason. The Right of
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tions to his Friends, whilst he lives, for the Support of his unassisted Children. If, through Chance or Inadvertence, he neglect it, the Law of Benevolence, that fundamental Principle, requires such, as are nearest in Blood and Affection to the Deceased, to take upon themselves this Care: Nature, in a state of uncorrupt Nature, upon the Consciencs of those, under whose Notice the Orphans may fall; so that Nature has not left this compassionate Case unconsidered, unprovided. Yet, suppose that Property descends by the natural Law; if the Children are grown up, and are possessed of what is sufficient for their Use, before the Father's Death, they stand in no Need of this Succession; and by that Principle, which confines Property to Subsistence, and a Capacity of using, they are even barred from accepting it. If they are weak, and unable to maintain themselves, tho' the Property descend, they cannot occupy; that is, acquire it, or complete that Transfer of it,

of making a Gift is a Natural Right. But if it be made just before the Death of the Giver, in Trust for a particular Purpose, the Execution of that Trust must, in a State of Nature, depend merely on the Faith and Honesty of the Trustee: Whereas, in Civil Society, Laws have provided Methods of compelling him to perform it.

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which the presumed Affection or Will of the Deceased, by the Operation of Law, tenders to them. How then are the Children better provided for in this than in the other Way, reasoning upon the Matter as in a State of Nature?

We may carry it still further, and shew, that if the Right of Inheriting be not considered as a Right conferred by Society, the greatest Absurdities must be charged upon the Civil Laws of all Countries.

1. If the Right of Inheriting is a natural Right, as arising from the Principle of Affection and Relation, not positive Institution, then it cannot be confined to a Man's Children, but, in Failure of Issue, must extend to all his Kindred in their several Degrees. Now that is no Law to regulate Men, either in a State of Nature or Society, which does not extend to particular Cases; and Nature will not suppose a Right of Inheriting, without any Rule to go by in the Application and Conferring of it. That Rule can be but one; yet Civil Laws have pursued a thousand different Ways, contrary to the Law of Nature, according to this Reasoning. 2. If the Right

Right of Inheritance came in by the Law of Nature, and might subsist in a State of Nature, we may, for Argument-sake, imagine the Descent carried on through several Generations. In consequence, Prescription (either for a certain Time, as by the *Roman* or our Statute Law, or for Time immemorial, as by the Common Law) must give a Right; otherwise antient and obscure Pretences of wrongful Possession might be set up, in order to divest the present Owner, and to disturb the Public Tranquillity. But then the Law of Nature would be destructive of itself: For, is it not contrary to natural Principles, that a just Right should be barred by any Length of Time, and the Accident of not demanding it? Or, omitting that Consideration, can Prescription determine the Matter, without Civil Judicatures, to which it may be pleaded? Has Nature decided of the legal Presumption established in Civil Laws arising from long Continuance; or has it declared how many Years shall limit or bar a Right, any more than in what Order Inheritances shall descend? If it has, Civil Laws would do well to follow its Provisions, instead of differing from one another and themselves. Nor let it be said, that Disputes about prior.

Occupancy are exposed equally to the Objection of disturbing the public Tranquillity, as Disputes about Inheritances; both because those of the first Kind lying within the ocular Observation of many, and taking their Rise upon the Spot to be occupied, must be of easier and simpler Determination, depending not at all on legal Presumptions, and artificial Reasoning; and because, without the Principle of prior Occupancy, there could be no such thing, in a State of Nature, as the Acquisition of Property. And, therefore, any Disputes which might be supposed to arise from it, are to be considered as an inevitable Evil, whilst that State remains. But the Right of Inheriting is not a Manner of acquiring Property necessary for the Subsistence of Mankind, and to support the Purposes of Nature. 3. Civil Laws have always distinguished between *Jura Sanguinis* and *Jura hæreditaria*; considering the one as instituted by Nature, the other by civil Compact. The Roman Law says, *Hæres est Nomen Juris, Filius Nomen Naturæ*; and Cases might be cited out of it, which were affected by this Maxim. In the Law of *England*, the same Distinction is clearly made. If a Man attainted be murdered by a Stran-

a Stranger, the Son shall not have the Appeal, because it is given to the Heir: Yet, if he is murdered by the Son, it has been held by some great Lawyers, that the Crime is Petty-Treason, because the Relation of a Son remains. If a Man is attainted, and have a Charter of Pardon from the King, so as to be capable of being returned upon a Jury between his Son and another, the Challenge, on account of Consanguinity, continues; notwithstanding the Corruption of Blood is not taken away by the Pardon. Now, if the Right of Inheriting be a Right of Nature, the Name of an Heir cannot be separated from that of a Son, but they must stand and fall together, because *Jura Sanguinis nullo Jure Civili dirimi possunt*. But against this Reasoning we have the Authority of Two Systems of Civil Law, which are noble Efforts of human Reason, and the accumulated Wisdom of many Ages.

The Right of Inheriting being proved of Civil Institution, it may naturally occur to one, who turns his Thoughts upon this Subject, that "It is an Institution contrived only for the Benefit of a Man's Children; and,

“ therefore, ought not to be obstructed by
 “ the Demerit of the Father.”

It will be proper to premise the Answer to this Objection with observing, that altho' the Right of Inheriting be hitherto the Expression generally made use of in this Discourse, and relative to the Heir only; yet the Argument holds equally true of the Right of transmitting Property, which is relative to the Ancestor. For these Rights imply and suppose each other, if the same Person be considered both as an Heir and an Ancestor; that is, in the two different Lights in which he stands, with respect to those who have gone before him, and those who are to succeed him; and therefore the Terms may be said to be convertible; the one only referring to him to whom the Property descends, and the other to him from whom it comes. And now, if, without being thought guilty of Refinement, we may resort to the first Elements of Civil Society for the Reasons on which these Rights are grounded, they seem to be Two; and neither of them has any Relation to the Children: One, that when those Things, in which a Man had gained Property for his Subsistence, ceased to be his in
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the Course of Nature, the nearest Relation should inherit and take Possession, lest the Eagerness to contend about succeeding to them, might turn the State of Civil Society into a State of War. And hence the Rules of Descent have been extended in so many Countries, to take in the remotest Kindred of the first Occupant or Purchaser. The other, that, when every Individual gave up natural Rights, as the Protection of Society was due to him, for submitting his own Revenge to public Justice, so this Right of transmitting Property was conferred upon him as one Recompence, for pursuing his private Advantage in many Respects, where Nature interferes not, subordinately to the Good of Society; and to make the Advantages, so acquired, more permanent than in a natural State, by extending the Enjoyment to Representatives, as it were, beyond the Bounds of Nature. How just therefore is it, that he, who has not only ceased to pursue that Good, but taken Measures to destroy it, infringing the original Contract, should forfeit the Protection, and lose the Recompence, he gained by it! And if the Course of Descent, tho' in its Effect, and perhaps secondary View, beneficial to the Children, owe its Institution to Reasons,

which solely regard Civil Society, why may not Reasons of the same public and general Utility account for the Interruption of it?

In Support of the Notion here advanced, and the Use made of it, one may observe the Difficulties which must attend any Endeavour to explain the Grounds of this great Institution, upon the other more obvious and common Notion, stated in the Objection. Now it is a Consequence, that if the main Cause of providing a Course of Descent for Property was the Benefit of the Children, the first Makers of Laws concerning it must have had a particular Attention to them, not merely as the Descendents and nearest Relations of their Father, but as left in the weak State of Infancy and Orphanage. But then the Manner of this Provision is in no Sort proportioned to the Cause of it; for in some Respects it does too much, and in others too little: Too much, as the Right of Inheriting becomes the mere Favour and Gratuity of Law, to Children, who are not in that weak State, at the Time of the Father's Death, and therefore not comprehended within the Reason and Foundation of the Right: Too little; for if their Benefit be the principal Cause,

Cause of this Establishment, then the equal Partition of the Father's Property should take place between all the Children; and those Civil Laws, which transfer the whole Inheritance by Descent to the eldest, ought to give proportionable Shares of it to the rest, in case the Father has neglected it. But as a farther Evidence, that the complete and principal Reasons of this Establishment must not be drawn from this subordinate Effect and secondary Purpose of it, but from the Foundations of Society, let it be considered, that of itself, and unattended by other Provisions in Favour of Infants, this Right of Inheriting is equally ineffectual to their Service in a State of Civil Society, as it has been * shewn to be in a State of Nature: and it is somewhat extraordinary in Reasoning, to assign that as the final Cause or main End of any Institution, which the Institution itself is apparently not fitted to attain. It is also more unnecessary, because in a State of Nature, antecedent to Civil Policy, it is impossible to suppose any other Means of providing for them, than either such as may arise from the Exercise of Rights, which Nature has annexed to themselves (of which Kind the

* Page 17, 18.

Right

Right of Inheriting is supposed to be), or such as may be contrived by the tender Affection of the Parent, or the disinterested Care of the Benevolent. In a State of Civil Society, the Means are various: Infants are not only of private, but of public Concern. And surely the Invention of those great Masters of Policy, the antient Lawgivers of most Countries, failed them unaccountably in this Instance, if the great Cause of establishing Descents was the Protection and Benefit of Infants; since the same End might have been answered far better in other Ways, without conferring any Rights of Inheritance at all, or making any Alteration in the natural and original Condition of Property. The Supreme Power of each State might have taken all Children out of the Hands of their Parents, maintained and educated them in a State of Equality under the public Care; and then, without exposing them to the Danger of that enervate Indolence, or vicious Activity, too often owing to hereditary Wealth, might have drawn them out, according to their Age, Capacity, and Improvements, into the Civil or Military Service, more usefully and more honourably for themselves and their Country. This Plan is so obvious, as
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well as grateful to the Imagination, that it has been touched upon by many Writers, and is beautifully pursued in Theory to its utmost Extent, by the Framers of imaginary Commonwealths, *Plato* and *Sir Thomas More*. But the Legislators of real States saw the absolute Necessity of establishing Inheritances for the general Order and Welfare of Society ; and at the same Time knew the Plan just mentioned (at least as to the full Execution of it) to be impracticable, without allowing that Community of Goods, of which visionary Legislators are fond ; but which neither the Passions of Men, nor the Circumstances of Society, could bear.

To these Arguments it may be added, That the Course of Descent is alike obstructed by one Sort of Alienation as another ; and if the Benefit of the Children was the only or chief Source of legal Descents, it will follow, that there ought to be no such Thing as a Power of alienating, in any Manner, vested in the Father : A Consequence, which, it will readily be allowed, should be guarded against ; both as it would destroy the mutual and necessary Dependence of Families, and introduce Perpetuities so dangerous to that

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Circulation of Property, which animates all social Industry. Hence it is, that a Man's Posterity are not only indebted to the Laws of that Country, which gave them Birth, for a Capacity of inheriting, but, by the same Laws, are commonly left in the Power of the Father, as to their receiving actual Benefit from that Capacity. In *England*, a Tenant in Fee Simple may charge, waste, or sell his Estate, and convey it away for ever from his Heirs. He may devise it by Will; and, unless in Cases of Fraud, the Law will not interpose to make it void. A Tenant in Tail is Master of his Estate, if he pursues the Methods of Conveyance proper to it. In these Instances it may seem very hard, that any Man should dispose of a Fortune from his Posterity; and yet the Law having put them out of the Father's Power, as to every Grant, which they receive from the Kindness of another, and the honest Fruits of personal Merit, it wisely forbears to break in upon the Law of Nature, which allows a Freedom of Alienation; and expects no more from the Father, than that he conduct the Child, as long as he is able, thro' the Weakness of Infancy, to a Condition of supporting himself by his own Labour

bour and Attention. Shall it then be in his Breast to aliene in the Forms of Law, as Interest or Humour leads him? And shall not his Attempts to dissolve Society be equitably construed, for Reasons of public Usefulness, a virtual Intention of exerting his utmost Power to alienate those Benefits, which might have been derived thro' his Channel from the Favour of Society? Is it fit or reasonable, that this Privilege of alienating at Discretion, to the Prejudice of his Posterity, should be so freely indulged to him, upon a plain Principle of natural Equity, that every Man may dispose of his own Property as he pleases; and that the Society, which has from Favour, and positive Institution, conferred on him a Right to transmit that Property to Heirs, should not be allowed to confer such Favour upon its own Terms (Terms indeed essential to its Safety)? That is, in other Words, Is it fit or reasonable, that Society should be denied the Benefit of that Principle of Equity, by which the Privilege of alienating, so valuable to each Individual, is indisputably framed and supported?

But it may be said, "The Alienation by
" Forfeiture is more extensive than any
" other

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“ other allowed in the Law of *England*,
 “ because it is attended with the Loss of
 “ Honours, which cannot otherwise be ali-
 “ ened; and the Corruption of Blood stops
 “ the Course of regular Descent, as to Estates,
 “ over which the Criminal could have no
 “ Power, because he never enjoyed them.”

As to Honours, they have so far been alienable amongst us, in former Times, as that a Man might, by Surrender, restore them to the Crown, that Fountain, from which they flowed. The Law is now differently understood in this Respect. But tho' they are not alienable, like most Inheritances, since that would be to debase and prostitute them, yet they seem peculiarly the proper Object of Forfeiture; for, being, in a stricter Sense than other Kinds of Property, the Gift and Creation of Society, the Terms, on which they are given, must be intirely subject to its Power. And is it not natural and politic, that a Distinction bestowed only for the Praise of them, who do well, should be forfeitable, on the Commission of Crimes, for a Terror to Evil-doers?

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As to the Corruption of Blood, it will be easily understood, when the Meaning and Reason of it are expressed in common Language, free from legal Terms of Art. The Proposition to be explained is no more than this; That if a Man is not capable of transmitting Property acquired by himself to an Heir, it seems a necessary Consequence in Reason, which is the Ground of Law, that he shall not be capable of receiving from an Ancestor, either to enjoy, or to transmit. And the Proposition may be made out by a very short Deduction. The Methods of acquiring Property can only be divided under the two general Heads of Purchase (*Perquisitum*), and Descent (*Hæreditas*); the one referring to him, who takes or acquires Property in the first Instance by his own or another Man's Act; the other, to him, who takes or acquires the Property of an Ancestor immediately upon his Decease, by Act and Operation of Law. 1. Whoever acquires Property by Purchase, must do it in one of these Ways; by prior Occupancy, by Emption, or by Gift. These are the natural Ways of acquiring Property, and must subsist in a State of Nature, anterior to Civil Society.

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Society. Here the Cases are infinitely complicated and various, and the Rules of Evidence will vary, according to the Nature and Circumstances of every Case. And whoever claims, under this Title of Property, claims in his own personal Right, without deriving from Ancestors. Therefore the Son of an attainted Person is equally favoured in whatever he takes by Purchase, and in the Remedy he pursues for this Right, as any other Subject of the State. 2. Acquisition by Descent is not Natural, but merely Positive (as has been shewn), and founded on the Policy of Civil Laws. Here the Cases cannot be complex, because the Laws of Descent in most Countries are very clear; the Rule of Evidence is single, and will not admit either of Restraint, or Extension, in applying it. This is particularly true in the Feudal Law. For by that Law whoever claims under the Title of Descent as Heir, ought strictly to deduce his Pedigree thro' Ancestors from the first Purchaser or Acquirer. And that is the reasonable Rule of Evidence in Descent. Yet because such Evidence may often be difficult, a more favourable Rule has been introduced in *England*, that it should only be necessary for
a Claim-

a Claimant by Descent to prove himself Heir to the Person last seised. This is taken to be sufficient presumptive Evidence of Relation to the first Purchaser ; the Law expects this should be exactly proved, and does not require the Evidence to be carried further. The Consequences flowing from hence, in point of Reason, are undeniable. 1. That when he, who was last seised of the Inheritance, has committed Treason, and the Law has said that he shall no longer enjoy it himself, nor transmit it to an Heir, of course no such Title can be made by any one who claims as Heir within that Rule of Evidence. 2. If the Claimant cannot make Title where the Offender was seised, because the *Vinculum* of Descent is destroyed ; neither can he make Title where the Offender was not seised, if that Offender be an Ancestor, who forms the *Vinculum* between the Claimant and the Ancestor, who was seised. What then is the general Reason of Law upon this Case ? The offending Ancestor is by Act of Law disabled from inheriting or transmitting Property to Heirs. Shall then the Law, which is only to be moved by Considerations, that effect the Whole, be moved, in this Instance, by personal Compassion to his Family ; and make an

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Effort of itself, inconsistently with its own solemn Act, to supply that connecting Link in the Chain of Descent, which has been struck out of it, for the Traitor's Infamy, and the public Benefit?

After this, it may be objected, that “ The
 “ Expectation of Inheriting, in which the
 “ Children are educated, confers a Right
 “ on the Principles of Conscience, which
 “ speaks the Dictates of the Law of Nature.
 “ It is ever thought a Cruelty, that Fathers
 “ should alienate from their Children by
 “ wasteful Expence, or Gifts to Strangers.
 “ The *Roman* Law for this Reason provided
 “ *Querela Testamenti inofficiosi*; and some
 “ local Customs in *England* gave the Writ
 “ *de rationabili parte bonorum*. Why then
 “ should Society make these Alienations
 “ the Consequence of an Act, which has no
 “ immediate Reference to alienating; espe-
 “ cially when it is the Business of Laws to pre-
 “ vent the ill Consequences naturally arising
 “ from Mens Actions, instead of adding to
 “ them by Implication and Construction?”
 The Objection seems founded on good Reason, and yet must give way to better. If we consider the Kind of Expectation here spoken of,

of, it will be found to arise only from the ordinary Course of Families and legal Descents, and not given in such a Manner, and with such Circumstances, as to confer a Right, on any Principles of Law or Conscience. Whether therefore we take the Right of Inheriting as conferred by Civil Society, or, for Argument-sake, by Nature, the Expectation arising from it is the same; since it must be considered, in the first Case, as bestowed originally on Condition; in the second, as qualified by Civil Institution, like many other Rights of Nature. And if those who form the Expectation will regard that as absolute, which depends on the Performance of express Conditions, the Inattention must be imputed to themselves, and not to the Law of their Country. To waste a Fortune which would have made an honourable Support for a Man's Family, is deservedly esteemed cruel and against Conscience. Why is it not prevented by the Care of Legislators? Because no complete Provision could be made against that Evil, which would not be attended with more general Inconvenience; and the Compliance with the contrary Duty is derived from the Manners, and the Heart, grounded upon

Principles, and enforced by Sanctions, of an higher Order than belong to Civil Laws. If the greatest Good of every Community be the Object of Laws contrived for it, as unquestionably it ought to be, every lesser Interest must yield ; it being only the Property of Divine Government to reconcile all private with public Good in the final Result of its Dispensations. Hence it is, that tho' Laws prevent Consequences injurious to Particulars, where they can, consistently with social Good, yet in Matters which concern the Existence of the Society or Government, Consequences injurious to Particulars must not only be suffered to take place, but even sought for and indulged, if they have a Tendency to prevent Consequences injurious to Government itself. On this Reason stand those severe Laws, which have been made in several States against Neutrality in Times of common Danger. It is agreeable to the Policy and original Compact of Government to blend and involve the Interest of every Member with its own ; on which Account the Fortunes of private Men in all Countries must depend upon public Revolutions. Were it, in any Respect, the Aim of Civil Laws to make particular independent of the
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social Good, as it would be a very singular Strain of Policy, so it would proceed upon a Principle more contrary to the Law of Nature, than those, who are fond of that Law, would desire to see charged upon their Doctrine. Besides, nothing is more natural, on the Principles laid down in this Essay, than the Construction which Civil Laws have put on Treasons against Government, that when a Man endeavours the Dissolution of it, he means to disclaim all those Benefits and Rights, which it has either made him capable to enjoy, or the Instrument to convey: Nothing is more necessary, than to try whether those Attachments, which are connected with our Passions and Affections, will prevail, when those, which are founded only in Reason and Convenience, have no Power. *Sic legibus comparatum est* (says Tully) *ut filiorum caritas amiciores reddat parentes Reipublicæ.* Thus Society, by making the Loss of those Rights it confers upon every Man, a Penalty for the greatest Crime, which can be committed against his Country, interests every Relation and Dependant in keeping him firm to the general Tranquillity and Welfare; at the same time, it gives him an Occasion of reflecting, that,

when he attempts it, he must break thro' every private as well as public Tie; which enhances his Crime whilst it is an Aggravation of his Punishment. Nay more, he may hope to escape from the Justice of his Country with his own Life, if that alone were to be forfeited; but the Distress of his Family will pursue him in his securest Thoughts, and abate the Ardour of Resolution. Many Instances occur in History, and daily Experience, of Men, not ashamed to commit base and selfish Enormities, who have retained a Tenderness for their Posterity by the strong and generous Instinct of Nature. The Story of *Licinius Macer*, who was Father to *Calvus* the great Orator, is very remarkable, as related by a *Roman* Annalist. Having gone thro' the Office of Prætor, and governed a Province, he was accused, upon returning home, of Extortion, and Abuses of his Power. The very Morning of his Trial he strangled himself, after having sent Word to *Cicero*, who was preparing to plead against him, that, being determined to put an End to his Life before Sentence, (tho' the Penalty did not extend to taking it away,) the Prosecution could
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not go on, and his Fortune would be saved to the Benefit of his Son.

Upon the Whole then, Where is the Wrong? It is agreeable to Justice to bestow Rights upon Condition. It is the Wisdom of Governments to lay hold on human Partialities.

But it is not enough to rest upon Arguments from Reason, to prove there is nothing in Forfeitures of this Kind inconsistent with Justice: It must likewise be proved, that they are agreeable to the Practice and Genius of the freest States. This is doubtless a Matter of much Importance, and likely to have the greatest Weight with those, who are more ready to suspect a Fallacy in strong Reasons, than great Authorities. It may be necessary to be large in shewing it, because it has been relied on to a contrary Purpose.

In the *Jewish* Republic there are Instances, in which Children were destroyed, by the Interposition of Providence, for the Crimes, and to increase the Sufferings, of their Fathers. This by no means furnishes an In-

ference to the Nature of human Punishments, being inflicted by the Hand of God, with an exprefs Prohibition to the Civil Magistrate to imitate it, and founded on the particular Constitution of their Theocracy. But the Forfeiture of inheritable Estates stands upon other Reasons, and was consequent on a Judgment pronounced and executed by the ordinary Magistrate. The taking away of Lands from *Mephibosheth* by *David*, and the Confiscation of *Naboth's* Vineyard by *Ahab*, are Examples of it; and tho' both suffered unjustly, yet, had their Trial been conducted with Openness and Impartiality, there had been no Danger from the mistaken Jealousy of the King, or the Oppression of the Tyrant. In the Time of *Ezra*, after the extraordinary Providence was, in a great Measure, departed from the *Jews*, there is an Evidence of it in that public Act of the State, by which all, who had married foreign Wives, were to make their Appearance before the Elders in three Days, under Pain of forfeiting their whole Substance.

By the Constitution of *Athens* there were three Sorts of *Infamous**, which was a

* *Petit. Leg. Att.* 508.

Term

Term of Art in their Law. 1. Those, who aimed to introduce Tyranny, as in the Case of such as aided *Pisistratus*. 2. Those, who owed Money to the Public, and neglected or refused to pay it. 3. Those, who had received Bribes, behaved ill in Sea or Land Fights, thrown away their Shields in Battle; all such were banished, and deprived of every Immunity, both they, and their Posterity. It is true, Judgment of Forfeiture was only inflicted discretionarily in the first and third Kind of these Infamies, but followed in Judgment of Law as to the second. *Plutarch* tells us, that *Themistocles*, for concealing the treasonable Correspondence of *Pausanias* with the King of *Persia*, forfeited his whole Estate, to the Value of Eighty or One hundred Talents, to the *Athenian* Treasury; and his Children took Refuge in *Persia*. Thus, if before Sentence pronounced, especially in the Case of Murder, a Man fled from Justice into perpetual Exile, the Consequence was, a Forfeiture and Sale of his Substance by the proper Officers for the Use of the public Coffers. It was another Law with them, that any Magistrate corrupting others to advise, or himself advising, the People to abrogate the Laws Criminal,

Criminal, should forfeit his Substance, himself and his Posterity be outlawed, and subject to be destroyed with Impunity. They looked upon these to be the Pillars of the Commonwealth, and that it was the Magistrate's peculiar Duty to uphold them. *Demosthenes* * accused a Man before the People, who had proposed a Vote, by which Fines and Forfeitures were, in Effect, to be taken away. He speaks of the Guard, which had been set on that Part of the Constitution by the Care of their Legislators; and assigns a very artful and flattering Reason to the *Athenians* for a Law, which made it Forfeiture to propose the Restitution of Persons in particular Circumstances of Guilt; That
 “ the Legislator, knowing the natural Le-
 “ nity and Compassion of his Countrymen,
 “ would not expose the public Safety to the
 “ Pretences or Abuse of it.”

By the *Roman* Law, the *Crimen læsæ Majestatis* † comprehended many Branches, of which the *Crimen Perduellionis* was, in all respects, the most severely distinguished, and at first the only Capital. It was so from

* *Dem. adv. Timocrat.*

† *Manut. de Leg. Rom. Par. 1557.*

the earliest Times of the Republic; and is marked out as such by the Laws of the Twelve Tables; which is not only an Evidence of the Practice in *Rome*, but of the Regard had to it in *Greece*, from whose Commonwealths, particularly *Athens*, those Laws were borrowed. By Capital, amongst the *Romans*, was meant, not only the Punishment of Death, but the *Minutio Capitis*, which, in the largest Sense, included the Loss of all Capacities, and a Forfeiture * of a Man's Substance to the Treasury; because, as the Digest phrases it, *Qui Civitatem amisit, Hæredem habere non potest*; "He who has lost the Rights of a Citizen, can have no Heir;" it being considered by the *Roman* Law, as a Privilege conferred by Society,

* Bishop *Burnet*, in the Second Volume of his History, p. 522. where he says, that Forfeiture was never the Practice of free Governments, lays it down, That "it was an Invention under the Tyranny of the Emperors, who had a particular Revenue called the *Fisc*, from whence it was called Confiscation." To this one may oppose the Words of *Cujacius*,—*Fiscus erat Populi, nunc Imperatoris*. *Cujac. ad L. Jul. Maj.* Which Passage intimates, that Forfeiture was a known Punishment during the Republic. It was then called *Bonorum Publicatio*. But the Bishop seems to have been misled by the late Origin of the Word *Confiscation*, to imagine the Thing itself was introduced no earlier.

to transmit Property by Descent. This Crime of Treason was punished both by Death and Forfeiture. The Case of *Sp. Mælius*, in *Livy*, is expressly to this Purpose: He is said to have been put to Death for aiming to destroy the Republic, and his Goods and Estates sold, which he had applied to the most unworthy Use. When the Sentence of Forfeiture passed upon any Man, without depriving him of Life, it was given in the Form of Interdicting from Fire and Water. *Cicero's* Estates were confiscated by that Form proposed to the People after his false Step of withdrawing from *Rome*, and not by any express Words in it, but by the legal Operation. *Antony*, *Dolabella*, *Lepidus*, were adjudged enemies to the Commonwealth, and their Estates confiscated. Even *Cæsar*, who was for mitigating the Penalties on the *Catilinarian Conspirators*, moved a Confiscation of all their Property to the public Coffers. This particular Kind of *Læsa Majestas* was held in such Horror, that Encouragement was given to Accusers. By Law, the Informer had his Pardon, if an Accomplice; nay, if his Accusation was against a Magistrate in Office, provided he were capable, his Reward was that Magistracy:

If

If the Accused was only a Magistrate elect, he was allowed a Seat in the Senate, and to give his Opinion in the Rank of that Magistrate. The Accused was immediately disabled from paying, selling, alienating; and no Dignity was exempted from the severest Methods of Examination. What is still more, this was the only Charge, which pursued a Man's Memory and Posterity; for, in case he died while the Prosecution was depending, his Heirs were obliged to defend it: Otherwise Confiscation ensued, as if the Crime were admitted or confessed.

Thus it stood in Matters of Treason thro' the best Ages of the Commonwealth. The *Cornelian* and the *Julian* Laws were the first, which made several other Species of *Læsa Majestas* capital, as well as *Perduellio*. As to public Crimes not within that Description, these Laws seem chiefly designed to confirm, or perhaps inlarge, the Sanction of those, which had been growing up gradually, to guard against Offences, as Corruption increased. Public and private Force, the one with Arms, the other without, were punished with the utmost Severity: The first by perpetual Banishment to
some

some certain Place (*deportatio*), which was accompanied with Loss of all Rights and Capacities, and Forfeiture of Estate; the other with a Confiscation of One Third.

By the *Cornelian* Law, the Murder of a Father or Patron was capital; and by the *Julian*, the Murder of any Citizen was punished with intire Confiscation and Banishment.

The Crime of Peculate, or Embezzlement, by the same Law, was punished in like Manner. *Papinian* says, a Proceeding was followed for this Crime against a Man's Heirs. And long before the making of that Law, in the Instance of *Scipio Asiaticus*, Brother to *Africanus*, a Fine so heavy was set upon him, being charged with having concealed Part of the rich Booty brought home from *Asia*, that his Estate would not suffice to pay it: And, in such Crimes, they were often sentenced to refund four times the Value.

The Laws, which concerned Abuses in the Government of the Provinces, were equally strong: So were those concerning
Bribery

Bribery in Elections and Judicature ; concerning Deceit (which branched out into many Particulars), and clandestine Meetings.

This is a short State of the Laws, which had the Penalty of Forfeiture during the Republic. *Augustus* introduced little or no Alteration. In the single Case of *Cassius Severus*, being much galled by the Licentiousness of his Writings and Conversation, he caused the Matter of Libels to be treated capitally as a Crime of *Læsa Majestas*. For the Rest, the Mildness of his Nature inclined him, and the Liberty of *Rome*, so lately lost, made it his Interest, not to deviate in Things of this high Importance from the Constitution of his Country. At the same Time, he saw his own Security, and the Tranquility of the State, depended on the exactest Support of his Authority, and the Execution of these Laws. *Tacitus**, in describing the Progress of the Laws of Majesty, and the undue Extension of them in the Reign of *Tiberius*, expresses himself in this Manner: *Nomen apud veteres idem, sed alia in judicium veniebant; si quis pro-*

* *L. I. Ann. c. 71, 72.*

ditione exercitum, aut plebem seditionibus, denique malè gestâ Rep. majestatem Populi Romani minuisse. Facta arguebantur, dicta impunè erant. The great Point, on which he insists, is, the Difference between the Crimes, of which Men were accused under the Commonwealth, and under the Tyrants, who oppressed it. An unguarded Saying was Treason against Emperors ; but in the free State, a Man could only be accused of Actions, which had a direct Tendency to overturn Government. And it is to be observed of this Historian, who writes in the Spirit of Liberty, and censures with great Strength and Weight, that he never excepts to the Punishment of Forfeiture, as either a new Institution of those Times, or unjust and impolitic in its own Nature. The succeeding Princes framed several Laws, which carried these Offences to an Height of unjustifiable Severity. *Arcadius* and *Honorius* enacted one, which has been branded by the Civilians, as eminent above all for its Cruelty. The most remarkable Terms of it were, “ That the Intention of conspiring
 “ should be punished without any Overt-
 “ act; that they, who presumed to intercede
 “ for those accused of Treason, should be

“ disgraced ; that not only the Estates of
“ the Criminals should be confiscated, but
“ their Sons rendered incapable of inherit-
“ ing from the Mother, or any Relations,
“ or even of taking by the Will of a Stran-
“ ger ; that they should be perpetually in-
“ famous, and disqualified from aspiring to
“ Honours and Dignities, or claiming the
“ same Privileges of legal Credit with other
“ Men in judicial Contests ; that, in a Word,
“ the very holding of their Lives was to be
“ taken for a Mark of Imperial Mercy ;
“ and yet, it is said, their Condition shall
“ be such, as to make Life a Punishment,
“ and Death a Comfort.”

Some of the later Emperors by Law mitigated these, and even the antient and more just Severities ; but we neither find such Severities, nor Mitigations, whilst the Republic existed. This is easy to be accounted for. Different Emperors, according to their Tempers of Mind, or Maxims of Administration, might hope to render the arbitrary Power, by which they governed, secure or agreeable, by influencing the Fears, or engaging the Affections, of their People ; by setting forth Terrors to Resistance, or

Pretences of Lenity to Submission. But the great Men of the Republic, considering the Exigencies of Government, and knowing, that the Freedom and Excellence of their Constitution deserved all Reverence from those, who lived under it, and inviolable Protection from those, who regulated and administered it, disdained to act otherwise than upon one Model, according to the Rules of Justice and true Prudence; not the Dictates of Cruelty, or false Clemency.

We have seen, that the Forfeiture of Estates of Inheritance for a Man's Heirs, as well as himself, is not inconsistent with Justice. Strong presumptive Arguments have been drawn from the Condition of human Nature, the Law of the *Jews*, *Athenians*, and *Romans*, to shew it agreeable to Policy; which will receive great Strength from a View of the Feudal Law, especially when deduced from its Source, and applied to the *English* Constitution.

The Policy of Feuds has in it those Principles, which ought to prevail in the Foundation of all Policies, mutual Defence and Freedom. It was contrived by the People,
who

who sprung from that great Seminary of Nations, the *North*, as an Association to extend, preserve, and enjoy Conquests. The General or Prince, claiming to himself the Sovereign Property, parcelled out the Lands to his Commanders, who again made smaller Divisions to others, under a Condition of stipulated military Services, and of express Fealty, to be true to the Lord; but that lower Fealty, to be governed by their Regard to a more comprehensive, which centred in the Prince, and in a Support of the great Ends of the Constitution. The Potentates of the more Western Parts, disturbed by the Successes of so formidable a Confederacy, resolved to turn this Policy against the Inventors, and to dispose of themselves, and their Country, in the same Manner. In Matters of mutual Importance, Aid was to be mutual; and, in consequence of the Fealty, which enjoined it, the Feud or Parcel of Land, enjoyed by the Stipendiary, was taken to be a Security for the exact Performance of his Engagements. Now it followed from the military Relation thus begun, that the Lord must have great Interest in the Vassal's Qualifications. Hence the Feud could not be aliened either in

Whole, or in Part, without his Consent: It might not be sold, exchanged, mortgaged, incumbered, or devised. On the other hand, the Lord could not dispose of the Seigniorship without the Vassal's Consent; for it is certain, that the Vassal would, in his Turn, be much concerned in the Wisdom and Temper of his Master. In both Cases, the Freedom and Necessity of this Policy required a most faithful Observance of the several Parts of this Relation. If the Vassal failed in his Services, or in performing his Fealty, or endeavoured to disunite the Bands of Duty and Connection, by waiving or transferring the Feud, or, in general, did any thing to injure the Lord's Honour, Person, or Estate, it was forfeited and resumable. If the Lord proved guilty of Injustice or Oppression, his Seigniorship was forfeited by the same Law, and the Tenant was to transfer his Fealty to the Lord next above him, or to the Prince, as the supreme Guardian. These Obligations were expected from all, who had any Part assigned them, tho' it were by the Tenure of the Plough or Husbandry, in promoting the common Welfare.

Such

Such are the Principles and the Engagements of this Policy, which not only run through all that intricate Variety of Feuds, in Countries where it is preserved purest, but even where it received a large Tincture from the particular Customs of Nations, which adopted it. It is not material to inquire, whether the Policy was received in *England* before or after the Conquest. The Disputes between the Learned are endless. Something of the same Kind is admitted to have been maintained amongst us very early, even by the warmest Advocates for the *Norman* Original of it in *England*. Sir *H. Spelman**, in his Treatise of Tenures, allows, that an Oath was taken, not of Fealty indeed, but to defend the Lord of the Territory, and for Lands, as it were, held in Socage, but not by Knights Service. It is true likewise, that there was no feudal Escheat; yet a memorable Law of *Canute* (who caused the *Saxon* Laws to be observed strictly, afterwards called *Edward the Confessor's*) expresses a Punishment resembling it: *Qui fugiet a domino suo vel socio pro timiditate in expeditione navali vel ter-*

C. 21—23.

F 3

restri,

restri, perdat omne quod suum est, & suam ipsius vitam; & manus mittat dominus ad terram, quam ei dederat; & si terram hæreditariam habeat, ipsa in manum regis transeat. In this Case the Lands holden of any Lord are to revert to him; and the Hereditary Land, or *Saxon* Bocland, which, according to the Antiquaries, was free from Service or Tenure, is directed to go to the King, as a Regal Forfeiture. Consequently, this Penalty of forfeiting Inheritances subsisted in *England* before the Period commonly called the Conquest; resembles the Feudal Policy, though varying in some Circumstances; and, clear of Feudal Notions, may be justified from antient Usage, upon the general Principles, and for the Security of Government.

Let it now be taken for granted, that altho' the Kingdom had Traces of Fealty and Forfeiture, that is, of a Feudal Policy, from the earliest Times, yet that the Law of Feuds, strictly understood, was not received till after the Conquest; and we shall not find the Question affected by it, otherwise than as it throws new Light upon the Argument, and affords additional Reasons peculiar

peculiar to itself in Support of it. The two Inquiries to be made are, Whether the Law of Feuds was received with any Circumstances of slavish Submission ; and What Alterations arose from it in the State of Forfeitures.

The first of these Inquiries may be resolved by observing, that the Policy was not imposed, but came in by free and National Consent, at a Parliamentary Meeting in the Eighteenth Year of the Reign of *William* the First. The Law, enacting the Reception of this Policy, is observed, by a learned and judicious Writer *, to be penned, as if the King were merely passive, the more clearly to express the Consent of the *Commune Concilium* to so considerable an Alteration ; for the rest of the Conqueror's Laws are worded in another Manner, and seem to mention the *Commune Concilium* only in Reference to that Law. But, by several of these, the King engages, in favour of the Tenants, to make no unjust Tallages or Exactions, and to demand no other than such Services, as are purely feudal, and for the Benefit of the Kingdom. Thus the Policy of Tenures, as

* *Wright of Tenures*, p. 66.

adopted in *England*, has nothing precarious or illiberal. Even the Villeins, who were Bondmen to the *Saxons*, by being admitted to Homage and Fealty, received Infranchisement, obtained Freedom of their Persons, and an Use of occupying their Lands ; and by successive Statutes were advanced to some Account in the State.

As to the second Inquiry, concerning the Alterations introduced into the State of Forfeitures by the Reception of the strict Feudal Policy, it is remarkable, that in the Case of High Treason no Innovation was made. Indeed the Escheats of Hereditary Lands for Petty-Treason, and Felony, arose from that Policy ; so that where Tenants held immediately of the King, any Devolutions for these Crimes were properly Escheats ; but, upon Commission of High Treason, the Lands and Tenements, which came to him, were not Escheats, but Forfeitures given to him by the Common Law, derived from the *Saxon* Times, not depending upon Feuds, and exactly agreeable to the Law of *Canute* already cited. These, of whatever Kind, fell into his Hands, without any Regard to the Seigniorship of mesne Lords. The
original

original Feudal Law * supposes no Escheat or Forfeiture, but to the immediate Lord, even in Crimes, which concern the Prince or Proprietary. In the Law of *England* it is otherwise; and if we would assign a Feudal Reason for it, as well as Reasons drawn from general Policy, it seems probable, that Lords, being, in many Respects, answerable for the Tenants Misbehaviour, were considered as having failed in their Duty to the Crown (from whom the Lands both of the Lord and Tenant were supposed to be derived), by making Choice of an ill-inclined Feudatary; and were induced, by this Penalty, to observe a more than ordinary Care, in the Election of Persons to so great a Trust. The same Reason had Weight in Cases of Felony, where the Land should return to the Lord, and he might remit the Crime or Escheat; yet because a Neglect is supposed, on his Part, in the Appointment of a Tenant, the Land, and a Power to waste it, shall belong to the King a Year and a Day, in Prejudice of the Lord. Among the *Saxons*, there was no Escheat of inheritable Land in Felony; and Sir *H. Spelman*† thinks the *Kentish Gavelkind* Maxim, of the Father

* P. 117.

† C. 23.

to the Bough, and the Son to the Plough, was universal throughout the Kingdom. But in Matters of Treason, which strike at the Foundation of Policy and Government, even *Gavelkind* Lands are forfeitable, and always were; which is derived from those antient Lawgivers, as well as the Privilege in Felony.

It has been shewn, from the Nature of the Feudal Policy, that the great Principle of the Law of *England*, that all Lands bear a Reference to the King, as having the *Supremum Dominium*, is founded on the greatest Wisdom, and a true Regard to the common Safety. On this Account it is said, by the Feudal Writers, that Fealty could not be dispensed with; and tho' sworn only to the Lord, yet its Virtue and Effects operated, to the Benefit of the Whole. Hence the Observance of it was a main Article of Inquiry in the Lord's Court. For the same Reason, these Writers lay it down, that the direct Dominion cannot be alienated from the politic Capacity of the King; that Fee has its Name from Fealty; that no Covenant can be made against performing it; that tho' the Oath be spared, yet the Duty is virtually implied

implied in the Acceptance of the Fee or Feud; and that the Failure in this Fealty is the Loss of the Land. It has been already suggested too, that a Government thus depending on Fealty, and the Neglect of it attended with such a Punishment, was the earliest Constitution of *England*; and the good Effects arising from it might induce our Ancestors, with more Readiness, to embrace a Policy, which promised to convey the same happy Effects with greater Certainty, as it seemed to have this Advantage over the antient Form, that it cemented all Orders of Men more closely, and enforced their Connection more minutely: They were however not aware, that it would soon be made a Pretence for the Introduction of those burdensome Services, which occasioned all the Uneasinesses of succeeding Reigns. Sir *H. Spelman**, in one Place, expressly says, it is not his Opinion, that the Conqueror introduced Feuds or military Services in a general or less strict Sense, but the Law of Tenures in its full Extent, and those Services, which were the Grievances. The Nation soon felt the Weight, and threw it off in the Reign of his Son *Henry* the First, who, in his Char-

* Tr. of Ten. c. 28.

ter, mitigating Wardship, Marriage, and Relief, took away the evil Customs, which had been engrafted upon Tenures, and reduced the Policy to its pure State, and original Intention. They revived again by Degrees, and were, at different Times, limited and restrained by our Kings, being in themselves not at all essential to this Form of Government, but destructive of it, in giving it the Air of Slavery, when it was founded on Principles of Liberty, and breaking the Spirit of the People by Oppression. The Stat. 12 *Car.* II. c. 24. has since abolished even the military Services; and the Feud or Fee is much varied from its first Institution in the Course of Time and Law. It may then be objected, That the Principle of the Law of *England*, “ which supposes
 “ all Lands derived mediately or immedi-
 “ ately from the Crown, is no more than a
 “ Fiction; and the military Services being
 “ abolished, and the Crown-Lands dispersed
 “ amongst the People, the Reason of it
 “ ceases.”

I. As to its being a Fiction, it is very true, the Right of the People of *England* to their Property does not depend upon, nor
 was

was in Fact derived from, any Royal Grant. The Reception of the Feudal Policy, in this Nation, exactly answers the Definition of a * Fiction; which is some Supposition in Law, for a good Reason, against the real Truth of a Fact, in a Matter possible to have been actually performed, according to that Supposition. This being admitted, What follows? It will be urged, " That Fictions
" of Law are to convey Benefit, not Injury,
" to the Party using or adopting them; and
" that this is a preposterous Fiction, which
" tends to the Ruin of Families, by putting
" their Estates, for the Fault of one An-
" cestor, into the Power of the Crown." It has been shewn, that the Forfeiture of Lands for Treason was known in *England* before the Introduction of this Policy (whatever might be the Case in respect of other Crimes); and, even after, was never modelled upon the Rules of it. But not to decline arguing the Matter upon strict Feudal Notions, it will be necessary to try this Fiction, as it concerns Inheritances, by Maxims, which are in Law the Boundary of such Fictions. Does it prejudice the Right of Strangers? That cannot be said. Such Right

* *Calv. Lex Jurid.*

is saved, both by the Intention of the Common Law, and the exprefs Words of Statutes. And as to the Interest of the Heir, it is derived from that of the Ancestor, and intimately connected with it. Is this Fiction strained to a collateral Purpose, which does not naturally flow from it? Neither can that be said. For it is the very Point and Consequence of the Fiction, that, when the Tenant hath broke through his Engagements, the Land should return to him, of whom it is originally holden. In every Law, which has the public Advantage for it's Object, it may happen, that private Interests shall interfere and suffer. Yet, if it be a Suffering, because of a just and necessary Sanction, it must not be considered as an Injury; the End of that Sanction being to heal the Pravity, and deter from the Imitation, of bad Conduct. And thus the Feudal Policy, a Fiction, bringing Forfeiture along with it, may be considered as conveying Benefit to the Nation, and those who adopted it.

2. It is a Maxim in Law, That Fictions are not to be maintained beyond the Reason, which gave Rise to them. And it may be said, " That the Abolition of Tenures by
 " Knights

“ Knights Service, and the Fruits of them,
“ has destroyed the Reason of this Prin-
“ ciple.” But has not the Stat. 12 *Car.* II.
declared all the Ground of *England* to be
held in Common Socage? And is not Fealty
due for Socage Lands? And is it not agree-
able to the Ends and Welfare of Govern-
ment, that it should be due? What were
the Aids formerly granted and assessed in
Parliament, for the Support of the King’s
Wars? Or, What is the Land-Tax, now
annually raised for the current Service, but
of Feudal Original? A Kind of general Escu-
age, or Commutation for Service, accord-
ing to the Provisions of *Magna Charta*? Is
then the Policy, or the Reason of it, ceased?
What is this but a Regard to the Defence,
Security, and Honour, of the Realm? It
was thought in the Feudal Law, that a Man,
who had once violated the sacred Relation
he engaged in for the public Benefit, ought
to be excluded from it. Does the Reason
subsist no longer? The Strength of the
Kingdom is in the Landed Interest. Every
Man, who shares in it, has Influence over
his Tenants and Followers, and, in a greater
or a less Proportion, may prove an useful
Friend, or a dangerous Enemy. If he has
malignant

malignant Dispositions to the Laws and Government working in his own Mind, it is probable they will not stop there, but he will communicate and infuse the Poison into others, till his Schemes are mature for Action, and break forth to the Terror, if not to the Ruin, of his Country.

These are the Principles of the Feudal Policy, as far as it may be necessary for us to consider them with a View to the present Question. They are Principles of Freedom, of Justice, and Safety : The *English* Constitution is formed upon them. Their Reason will subsist, as long as the Frame of it shall stand ; and, being maintained in Purity and Vigour, will preserve it from the usual Mortality of Governments.

Let not then the Materials of this noble Fabric, designed by the Wisdom, and erected, at infinite Hazard, by the Valour, of our Ancestors, become the Object of Aversion and Hatred, or be held in Dishonour and Contempt. Formerly, the Evidences of our Constitution were perverted, to support the Maxims of Slavery ; they were abused, to varnish over the Purposes of Licentiousness.

Happy

Happy it is for us, that we live, when the Maxims of the one are exposed, the Purposes of the other disclaimed. And, whilst those Evidences are not destroyed, Conclusions, justly deduced from them, will prevail to latest Times, against the Artifice of false Reasoning, the Efforts of vain Ambition, and the Corruptions of a careless Posterity.

This Policy has been received, and subsists, in almost all Countries of *Europe*, tho' differently modelled and disguised; in some so deformed, as to be abused to Purposes of the hardest Oppression. The Constitution of *Germany* is free. What is the Ban of the Empire, but a Process of Forfeiture, issued by the Emperor against Princes, who, breaking the fundamental Laws, are deprived by the Judgment of the States, both they and their Posterity? *Matthieu*, Servant to *Henry IV.* of *France*, and the Historian of his Death, says, that he once asked an Avoyer, or supreme Magistrate, in *Switzerland*, how the Crime of Treason came to be so rare amongst them? "Because, answered the other, we punish Traitors with the utmost Rigour, and exterminate their Families."

“ milies.” In *Holland*, the Penalty of Confiscation was inflicted antiently, by Judgment of Law, for certain Offences. An excellent Writer spoke in Terms too general and inaccurate, when he said *, “ in that Province it was redeemable for an hundred Guilders.” For tho’ it be true, that by special Grants of some of the old Counts of *Holland* to certain Families and Estates there, this Privilege of redeeming Forfeitures prevailed; yet the municipal Law of the Country was otherwise at that Time (notwithstanding it has since received an Alteration). This was not only the Case in the separate Administration of many of the Provinces; but we are told, by those who treat of the Constitution of the *Low Countries*, That the Council of State condemns any Officer, who abuses a public Trust in the Finances, the Armies, the Negotiations, or Justice of the Republic, to the heaviest Penalties, by Fine, suited to the Crime, the Exigency, and Example. And it is much the same Thing to the Children of a Criminal, whether the Fortune of the Family is taken from them by Judgment of entire

* *Burnet’s Hist. of his own Times*, 2d Vol. p. 522.

Forfeiture, or by a discretionary Sentence condemning to a severe Fine, which may equal or exceed the Value of it. This Difference between them is observable, that in Crimes, where the Forfeiture is to be limited by the varying Discretion of the Judges, a Man may flatter himself, before he contracts the Guilt, with some specious and tempting Arguments (which we are dextrous enough to invent, when we wish to impose upon ourselves), that the Consequences of this Kind may be less severe than the Event proves them. But in Crimes, to which it is annexed, as an established Punishment, there is no room for such Arguments; and he may read the certain Consequences in that Law, which, as it is the inflexible Judge, so it ought to be the invariable Measure, of his Actions.

Thus we may reason from the Practice of free States. Yet one might frame a plausible Objection here: “ To what End serves a
“ mixed Government, if such Severities are
“ expedient to support it? In popular Governments, they may be expedient to deter private Men from conspiring to set up
“ Tyranny; in Kingdoms, a Democracy.
“ Schemes

“ Schemes of Civil Policy, which are found-
 “ ed on Extremes, must be maintained by
 “ them.” This is so far from being rightly
 argued, that a mixed Government unites
 and confirms the Reasons, which make such
 Severities expedient, both under popular and
 monarchical Governments. Where Things
 are exactly balanced, the stronger Defence is
 necessary to protect the several Estates, that
 no one may break in upon the Privileges
 allowed to any other. And, as the Law of
England is framed with a singular Felicity,
 the Defect common to Republics, a Want
 of Power to pardon, or, at least, the Diffi-
 culty of procuring Pardon, is supplied, which
 guards against a rigorous Severity; and the
 Oppression in State Crimes, common to Mo-
 narchies, is prevented by the well-tempered
 Course of Proceeding, which guards against
 a dangerous Injustice. Of these Particulars
 something shall be said hereafter.

It will be proper to examine, in this Place,
 what Estates, and what Rights of Property,
 were forfeitable by the Feudal Law; and,
 in comparing the Notions of the Law of
England with it, this Matter will receive
 the clearest Illustration.

1. All

1. All Goods and personal Things, as Money, &c. being a Man's own, and applicable to any Purposes he pleases, have been esteemed a proper Subject of Forfeiture. They were taken to be the Produce of the Feud, belonging to it; and were forfeitable, either in Whole or in Part, for Offences of inferior Moment.

2. Feuds, or Estates in Land, whether for Years, for Life, or descendible. 1. In Crimes that concerned the Lord or Feud, whether the Feud was *novum, vel antiquum*, that is, first granted to the Offender, or derived from an Ancestor, it was open to the Lord. 2. In Crimes, that concerned others, if the Feud were antient, it went to the next Branch of the Family; if new, it was open to the Lord, because Feuds, in the first Instance, unless it were expressly provided otherwise, could only descend, without inclining to a Collateral. In both Cases, the immediate Heirs of the Criminal were excluded. In this last Species of Crimes, the antient Feud went to the next Collateral Relation, tho' the Consent of the Lord, as well as his, was necessary to the ordinary

Surrender or Alienation of it. In the former, it returned to the Lord, tho' the Consent of the Collateral, as well as of the Lord, was necessary to the same Ends; so that the Power of conveying an antient Feud from a Man's Heirs, except by Crime, was not absolute in him, without the Consent of both these. And yet, in one Kind of Offences, there is a Devolution to the Collateral, without the Intervention of the Lord; and, in the other Kind, there is a Devolution to the Lord, without the Intervention of the Collateral. This Corruption of Blood, by which a Man cannot have an Heir, introduced a very important Consequence into Feudal Descents, That wherever it became necessary for one, who would make Title to another, to derive the Estate through an attainted Person, except where the Person claiming was particularly described in the Investiture, the Attainder was a Bar to his Title; as in the Case of a Grandchild claiming an Estate, in Fee, from the Grandfather, the Son having committed Treason, and dying, in the Life of the Grandfather. Some Feudists have not been willing to allow this Case, on account of its Hardship: And

*Craig**, a very able and elegant Writer on the Law of Feuds, is displeased with the Judgment in *Scotland*, which determined the Question in that Country. He intimates, that this may seem strange, the Son having never been in Possession, nor being capable of it. And it must be admitted, there is a seeming Hardship: Yet, because of the Rule of Evidence in Descents, by which the Son must necessarily be named in conveying the Descent, the Grandchild is excluded. The same Reason governs the Case of an Estate descending from the Uncle to the Nephew, if the Blood of the Nephew's Father (thro' whom the Estate must be derived from the Uncle) be corrupted. But he goes further, and says, That allowing this must be so upon legal Notions, yet, at least, the Estate might have gone over to the next Collateral Branch, instead of escheating to the Crown (of whom it seems, in the Case he states, to have been immediately held), since it would not be necessary for the Collateral to convey thro' the Criminal. He might trace his Descent from the last common Ancestor, who was an innocent Man, and a good Sub-

* *De Jur. F. l. 3. Tit. 6. § 11.*

ject, without the least Notice taken, in making out the Line of Descent, either of the Attainted or his Posterity, any more than if that Branch of the Family had never been a Part of it,

If this Reasoning be thought material, it may be said in Answer, 1. By way of general Foundation, that it is a Principle in all States, where a Man is neither a Subject by Birth or express Compact, or has voluntarily renounced the mutual Obligations, to consider him as not within their Obedience, or even Notice. But where he has forfeited his Civil Rights by Crime, he is regarded as still subject to their Power; and, in every respect, within the strict Consideration of the Law. 2. That the antient Common Law of *England* clearly proceeds upon this Principle. Where a Man was not capable of Civil Rights by Nature, as an Alien born, and never naturalized, being unknown to the Law, he was excluded from inheriting; and the next of Kin within the Allegiance, who did not claim under him, was admitted; or, where he had incurred Civil Disabilities by his own voluntary Act, not criminal, as one who entered into Religion,
or

or abjured the Realm, he was taken to have undergone a civil Death, and the next in Course of Descent entered. But where he is attainted of Treason or Felony, the Law will not pass him over, and marks him out *in rei exemplum & infamiam*. Hence it is, that tho' he was never in Possession, nor those who claim under him more capable of inheriting than he, by Reason of the consequential Disability arising from the Attainder of the Ancestor, yet the Estate will be interrupted in its Course to the Collateral, and escheat. For it is determined in all the Law-Books, and allowed by the learned Writer himself, without Objection, or Hesitation, That if the Father of Two Sons, of whom the eldest is attainted, died seised of an Estate in Fee, and both survive him, the younger Brother will not be Heir to the Father, because the eldest cannot be passed over. This Case would be the same, supposing the attainted Brother dead at the Time of the Father's Decease, if he left Children, since their Right of Representation, which must correspond to the Circumstances of him who is represented, would operate so far as to impede the Descent. And the Case being put in this Manner, as of the
attainted

attainted Son dead before the Father, and leaving Children, it comes exactly to the Case * objected to by *Craig*, of the Grandchild disabled from inheriting the Estate of the Grandfather, by the intermediate Attainder of the Son; in which Case he thinks, tho' the Grandchild cannot, yet the Collateral (that is, in the Case here put, the younger Brother) might inherit, consistently with the Rules of Evidence in Descents. It is difficult therefore to account, how this great Writer came to allow an Escheat, to the Prejudice of the younger Brother, in case the attainted elder survived the Father; and to complain of its Hardship, in case he died before the Father, and left Posterity behind him. The Posterity of the Attainted certainly do not stand in so fair a Light as the younger Brother, the immediate Descendant of an innocent Father, and who, in conveying the Descent, might claim immediately from him. This great Writer should have denied the Equity of both Cases, when he thought proper to deny one. But the Truth is, they ought both to be allowed, as falling under the same Rule of Reason and Po-

* *P. 71.*

licy, as well as Law. 3. One may venture to say, it is more probably beneficial to the immediate Heirs, on whom the Hardship is thought principally to lie, that the Estate should fall into the King's Hand, than to the collateral Branch ; because, in this latter Course, there can be little Hope of Restitution, and it might expose Families to endless Jealousy and Disunion. The King receives more Advantage from Acts of Mercy, than from the Coming-in of Forfeitures : And it is most agreeable to Reason and Policy, that the Disposition of them should belong to him, who is in Law considered as the Fountain of Justice, and Guardian of the public Safety. This Consideration might be one Inducement, amongst others, to that Petition of the Commons, 21 *Edw. III.* * in which they pray the King, not to alienate his Franchises. At Common Law, many Lords had, by Special Grant, or in Right of their Counties Palatine, Royal Escheats of the Lands held within their Franchises, of Persons attainted. Hence it became their Interest, from a Desire of enlarging their Possessions, to pursue Offenders with an unbe-

* *Cott. Rec.* p. 58.

coming

coming Violence; and the Lenity of the Crown was precluded by their private Right.

3. Titles, Dignities, and Honours were forfeited, as following the Reason of Lands, being originally derived out of them, or annexed to them by Tenure.

4. The Loss of Dower, by the same Law, arises from every Circumstance which destroys the Right of the Heir, except it be any Act done by the Heir himself. A Woman was to be endowed of the Lands, whereof the Husband stood seised at his Death. She had an Eviction, to turn the Alienee out of Possession, in case of any Alienation made, not completed regularly by Livery and Seisin: But when the Crime of the Husband, or Lord, occasioned Forfeiture, the one taking place before the Death of the Husband, to destroy his Seisin; the other perhaps, after his Death, and before Assignment of Dower made to her; the Right of the Heir being, in either Case, destroyed, her own, tho' generally favoured most highly, subsisted no longer.

The

The Law of *England*, which is compounded out of many Systems of Law and Custom, agrees, in some Respects, with the Law of Feuds; in others, has a manifest Advantage over it.

All Forfeitures for High Treason belong to the King; and by the Use made of this Prerogative, it should seem, that he is intrusted with it for the Purpose of Restitution to the Traitor's Family, as it may appear right from Circumstances; to reward the Merit of those, who have been faithful to himself and the Commonwealth; or to be applied to public Services, as either his own Wisdom shall direct, or the Parliament advise.

1. As to the Forfeiture of Goods, and Things personal, which the Party has or is intitled to in his own Right, these, being intirely in a Man's own Power, or descending to Executors, and not his Heirs, very properly follow the Conviction. Before Sentence, he may apply them to the Payment of Debts, to the Subsistence of himself and Family, and is prevented only from
a frau-

a fraudulent Sale to disappoint the Forfeiture.

2. As to the Forfeiture of Lands*, by the Common Law, all Lands of Inheritance, which the Offender had in his own Right, and all Rights of Entry to Lands, in the Hands of a Wrong-doer, came to the King, by Attainder of High Treason. The Inheritance of Things not holden, as Rent-charges, &c. is also forfeited. But if a Person committing Treason hath, at the Time of committing it, only a bare Right of Action to Lands, or a Right to reverse a Judgment against him by Writ of Error; this Right, neither at Common Law, nor by the Statute 33 *H. VIII.* is given to the King; because of the Danger in unsettling Possessions, and the Possibility of Prejudice to Strangers. In like Manner, no Right of Entry to Lands, of which there is a Tenant by Feoffment, or other Title, no Use, (except only Lands conveyed fraudulently to avoid the Forfeiture,) nor Condition of Re-entry, were liable to be forfeited previously to that Statute; neither could Lands in Tail, after

* *Hale's H. P. C. V. 1. c. 23.*

the Statute *Westm. 2. de Donis*, except for the Life of Tenant in Tail, till 26 *H. VIII.*

Before the Statute *de Donis*, Estates Tail, being only Fee-simples conditional, were exposed to Forfeiture like Estates absolute. By the Words of that Statute, *quod voluntas donatoris observetur*, &c. a Perpetuity was made, and the Donée restrained to alienate or forfeit. In a short Time it appeared, how much these Perpetuities were against the Reason of the Common Law, and the true Policy of the Kingdom. But the great Men not being easily induced to make an Alteration in Parliament, the Judges found a Way of cutting off an Entail by a Common Recovery, which was a Case held to be out of that Law. Another Wound given to these Perpetuities, was, by the Statute 4 *H. VII.* which made a Fine with Proclamations to be a Bar to the Issue in Tail, and so repealed that Clause of the Statute *de Don. quod finis ipso jure sit nullus*. When it was in the Power of Tenant in Tail to alienate, there could not be the least Colour or Pretence, why his Estate, over which he was become Master, should not become forfeitable; for it was under the Notion of his
being

being without Power to alienate, that Estates Tail were, at first, privileged : but the frequent Attainders, during the Disputes between the Houses of *York* and *Lancaster*, made Parliaments cautious of creating new Forfeitures. However, after the complete Union of the Houses in *Henry VIII.* by Construction of the Statute 26 *H. VIII.* c. 13. Estates Tail were made liable in Cases of Treason, where the Party was attainted by Confession, Verdict, or Outlawry *; and, by the Statute 33 *H. VIII.* upon any Manner of Attainder.

There is no Occasion to state all the Cases, either extending Forfeitures, or limiting them under the comprehensive Words of the Statutes of *H. VIII.* It suffices, that the Principle, on which they stand, is uniform, and agreeable to Justice; *viz.* that the Offender's Rights and Interests shall be forfeited, to the Prejudice of himself and his Heirs, to whom the Common Law intends no Favour, and whom the Statute expressly excludes from any Benefit of the Saving Clause; but that the greatest Tenderneſs

* 3 Co. *Dowrie's Case.*

should

should be used in preserving the Rights of Creditors and Strangers in Blood. Indeed, in respect of Lands, Forfeiture has a Relation to the Time of committing the Offence, so as to avoid all subsequent Charges and Alienations; which may be the Cause of Hardship to Persons, who have been unwarily engaged with the Offender; but, in Laws of public Justice, it is impossible to provide for every Case of private Compassion: and the Cruelty and Reproach must lie on the Part, not of the Law but of the Criminal; who, conscious that his Offence might soon be laid open, had the Inhumanity to involve others in the Consequences of that Iniquity, which proves fatal to himself.

There remains a material Difference to be noted, between the Case of a Fee-tail and a Fee-simple*; which is, that, notwithstanding the Forfeiture of Lands entailed by an Attainder, yet the Blood of the Attainted Person is not corrupted, so as, by any consequential Disability, to affect the Issue in Tail. Therefore, if the Son of the Donee in Tail be attainted of Treason, during the

* 3 Co. *Dowrie's Case*,

Life of the Father, and die, having Issue, and then the Father dies, the Estate shall descend to the Grandchild, notwithstanding the Attainder: but it is otherwise in the Case of a Fee-simple, as has been shewn in speaking of the Feudal Law. The Reason is obvious; because the Issue in Tail claims *per formam doni*; that is, he is as much within the View and Intention of the Gift or Settlement, and as personally and precisely described in it, as his Ancestor. But this is not all. The Forfeiture of Estates Tail came in by the Construction of the Statute of the 28th of *Henry VIII.* The Judges resolved, that the general Words of those Statutes comprehended these Estates. But then such Laws being of a penal Kind, tho' they are to be construed so as to attain their full Effect, yet they are to be construed strictly; and, however they might extend to make Estates Tail liable to Forfeiture, where they are actually in the Offender's Possession, and consequently in his Power to alienate, they could, by no Rules of Construction, be extended to bring consequential Disabilities on the Heir, where the Estates have not been in the Offender's Possession. The Forfeiture of Fee-simples is by Custom immemorial,

or

or at Common Law, which corrupts the Blood of the Criminal in Cases of Treason; so that no Person, who must make his Derivation of Descent to or thro' the Party attainted, can inherit. But, wherever he need not be mentioned in the Conveyance of Descent, as between Two * Sons of an attainted Father, nothing hinders one Brother from inheriting to the other; since, agreeably to the Rule of Law, the Descent is immediate: he can make himself Heir to the Person last seised, without the mention of the Father.

All this is clear: yet it may be said,
 “ That the old Law, as to impeding De-
 “ scents, has been altered in an Instance
 “ somewhat resembling this Case of Cor-
 “ ruption of Blood in Treason, the Case of
 “ Aliens. Antiently the Estate should sooner
 “ escheat, than an Alien might make Title
 “ to it himself, or convey one to another.
 “ But the Statute 11 and 12 *W. and M.*
 “ *C. 6.* clears the Interruption of Descent,
 “ occasioned by an Alien Ancestor, in fa-
 “ vour of natural-born Subjects.” This

* 1 *Ventr.* 413.

stands upon a single Reason. Lands descending to an Alien might not be taken by him, because the King could not oblige his Person and Services. And it seemed hard, that Subjects, within the Allegiance, who claimed under him, should be disabled from conveying Descent, by the Operation of a Reason, of which the very Reverse was true, as to themselves. But who are the Aliens enabled for this Purpose? Aliens (as the Law says) by the Act of God, the Fortune of Climate, the Decree of Nature. And in favour of whom are they enabled? Of such, as are not at all affected by the Reason, which excludes Aliens. But were the same Ability given to attainted Persons, it would be to admit those to a legal Right, who, tho' bound to the Community by Nature, moral Duty, and Experience, have disclaimed the Law, and are disclaimed by it; and, by their own voluntary Act, have shewn themselves Aliens in Affection. It would likewise be in favour of Heirs, whose Interest, in this Case, is not separated from that of the Ancestor, both upon the general Notion, that the latter can bind the Right of the former, at his Pleasure, in many Instances; and upon the particular Arguments unavoidably

bly affecting both, which have been drawn from Justice, and the public Good.

To shew how expedient these Punishments are thought, and how much the Law considers them as essential to its own Preservation, it may not be improper to observe, that a Corruption of Blood, by Attainder, is a Thing of so high a Kind, as that the King's Pardon can only restore, as to Issues born after; but an Act of Parliament is necessary for the Restitution of Blood, in its full Nature and Extent. That Corruption however goes only to Estates descending, in the Course of Inheritance. So it was in the Feudal Law. Nothing the Heir takes, by Purchase, is affected. He is capable under a testamentary Devise, or Family Settlement, or legal Grant of any Kind to himself. But here the Law of *England* happens to vary from the Feudal Law; because, by it, all forfeitable Lands are alienable at the Pleasure of the Party in other Ways, than by Forfeiture: whereas, in the Feudal Policy, they were forfeited, tho' not alienable or chargeable in any Way by the sole Will and Power of the Tenant,

and merely descendible to his next Heir upon his Death.

3. Titles of Honour and Dignities, by Tenure, were always forfeitable in the Law of *England*, as following the feudal Reason of Lands. And those, which are by Writ and Patent, whether to the Heirs General, or in Tail Male, are forfeited by the Corruption of Blood, which impedes the Descent, and renders a Family ignoble. The Right of Peerage is a special Trust reposed by the Crown for the Support of Government; and even before the 26 *H. VIII.* (within which, an Honour granted to a Man, and the Heirs Males of his Body, has been resolved by all the Judges to be forfeitable), it was not protected by the Statute *de Donis*, like Lands entailed, because of the Condition tacitly annexed to the State of Dignity; in the same Manner, as if Tenant in Tail of an Office of Trust misuse or use it not, it is liable to Forfeiture by Force of the Condition; as has been laid down in several Books *. Besides, it seems politically fit, that the Estate being gone, the Honours

* *Nevil's Case*, 7 *Co.*

should

should be taken away, because Wealth is necessary to support their Dignity, and without it they are an Incumbrance, and a Prejudice.

4. As to the Loss of Dower, it is to be justified in our Law, on the general Principle, that Society may bestow Rights on what Limitations it thinks fit, for its own Safety, and on the Strength of the Conjugal Ties to deter Men from Treason. In the Feudal Law, it is supported, not only by these Principles, but by artificial Reasoning; because the Loss of Dower arises from every Circumstance, which destroys the Right of the Heir. But by our Law, Dower is substantially affected, after the Title to it accrues, which is understood to be instantly upon Marriage, by no Act of the Husband, except the Crimes of Treason.

These are the Severities, by which the *English* Constitution binds the Observance of itself upon the Fears of Men, when better Principles have lost their Effect upon the Conscience. They are established to bear some Proportion to the Greatness of the Crime, that he may thus suffer, as Lord

Coke says *, “ who intended to tear and destroy the Majesty of Government.”

And now, after stating and explaining the several Rights of Property, affected by the Consideration of this Argument, an Objection may probably be made, that, to one of a plain Understanding, the Cases, which have been mentioned of impeding Descents by Corruption of Blood, carry with them a Severity to be justified upon no found natural Principles, and are governed by artificial Construction,

To this there are Two Answers : 1. From a general Principle already laid down in this Essay, that the Laws of Descent, as positive Institutions of Society, may be regulated on such Conditions as seem best to itself ; and being previously marked out, and uniformly interpreted, no Man has real Cause to complain.

2. In all Laws, there are Cases, which depend upon artificial Reasoning. If the general Ground-work be just and solid, tho'

* 3 Inst. p. 211.

some hard Cases are taken in, or governed by that Reasoning, they are often not to be remedied or avoided, without Danger. The fundamental Rule of Evidence in Descents, that whoever would make Title to an Estate, must prove himself Heir to the Person last seised, is held sacred. The Principle, that no one, who has committed Treason, can have an Ancestor, or an Heir, is equally wise, and reconcileable with Justice. When these Maxims concur in any Case, they form what is, in legal Phrase, an Impediment from Corruption of Blood. And they are antient and extensive Maxims. The best Lawyers of all Ages have been so sensible of the inviolable Regard due to legal Principles, that they have thought it more suited to the Genius of Laws to relieve by Fiction, than to depart from Principles. The *Jus Postliminii* of the Roman Lawyers, which reconciled the known Rule, that no Slave was capable of making a Will, with the Case of a Citizen taken in War, supposing him, if he returned home, always to have remained free, or, if he died in the Enemy's Hands, to have died before he became captive; is a celebrated Instance of this. The transitory Actions of the Law of *England* furnish

furnish another Instance of it. It is an excellent Constitution, that all Issues shall be tried in the County, where the Cause of Action arises, for the sake of bringing Justice home to the Parties, and for the Attendance of Jurymen and Witnesses: yet, because that may often be inconvenient, the Plaintiff is admitted, in many Cases, to lay and try his Action in what Place or County he pleases. Now, the End and Extent of these Fictions is observable: They both except particular Cases out of general Principles, the one for the Advantage of those, who have fought gallantly in Defence of their Country; the other, for the Furtherance of Justice; yet with Safety to those Principles. But no Fiction could be invented in this Case, without a Subversion of Principles; and that not in Favour of one, who has defended his Country, but to preserve and transmit the Inheritance of him, who would have betrayed or destroyed it. Thus one may argue, without resorting to the Maxim, that the King's Right shall not be barred by any Fiction; the Mention of which, on this Occasion, would carry less of Reason than Authority. Indeed, the Legislative Power may, by positive Statutes, alter

alter the Common Law, and limit the Operation of its Principles: and the Proviso, in the 7th *Ann. c. 21.* by which the Offender can forfeit a Real Estate only for his own Life, was designed to make that Alteration. But, whenever it takes place, let what will follow be observed:

1. It is considerable, that since the Forfeiture of Real Estates has a Relation to the Time of committing the Offence, a Man having lost all Power over them from the Moment of his Guilt, that Act will give Treason the Effect of a Settlement. The Ancestor's Iniquity will convey a Benefit to the Heir; which is an Absurdity allowed in the Law of no Country, and subverts the Order of Nature.

2. It is defective, and inconsistent with itself. For the Forfeiture of Personal Estates will stand intire. So that if a rich Trader of *London*, who has no Estate in Land, commits Treason, the Custom of the City, which makes a Disposition of his Fortune for the sake of his Heirs, is defeated: Which cannot be justified on any Principles, that
do

do not equally conclude to take away Real Estates for the like Crimes.

3. It will bring strange Inconsistencies into the Law, whose Severities are, at present, applied in proportion to the heinous Nature and Effect of Crimes. Treasons of the highest Kind occasion Forfeitures in the Manner which has been stated. Inferior Treasons as those relating to the Coin, do not extend to Corruption of Blood, and Loss of Dower. Petty Treason extends to all, except the Loss of entailed Estates. The higher Felonies to all, except Loss of Estates Tail, and Dower. Some Felonies are allowed the Benefit of Clergy, which saves Life, and the Inheritance of Lands, tho' not the immediate Profits; and discharges under certain Terms. Sometimes, where Clergy is not allowed, there is a Saving against Corruption of Blood, Loss of Dower, and Disheirison of the Heir. And some are followed by no Forfeiture, even of Goods or Chattels. Shall then severer Penalties be inflicted on him, who has deprived the meanest Subject of his Life, than on him who has attempted to throw his Country into Confusion, to stop the Sources
of

of Government, and to render those Rights and that Protection precarious, which alone give a Value to Life itself?

But it will be said, for the sake of maintaining a lost Argument, That it is to be wished all Forfeitures were abrogated. Be it so. And let the rest of *Europe* imagine to themselves, and be astonished, either that the Virtue of the *English* Nation is so great, as to make the ordinary Sanctions of legal Authority superfluous; or, that those Iniquities, which weaken Government, and cancel all the Bonds of Nature and Society, are of such extensive Influence, as to prepare an Impunity for themselves to the Completion of our Ruin.

It is impossible to debate this Matter, without entering into the general Arguments in Defence of the antient Constitution; tho' what gave Occasion to the Debate, was only a temporary Provision in Support of it. And, as to the Act of the last Session relating to the Pretender's Sons, which contains that Provision, those, who had the Honour of framing it, proceeded upon the most generous Views; the Safety
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of this Establishment, and an Abhorrence of every Attempt to overthrow it. To have exempted this Treason from the Policy of Forfeiture, had been doubtless very strange. And it would have seemed equally strange, that in a Bill, which concerns the Sons, the proper Sanction, originally given to it, should last only till the Death of the Father, one not interested in its Contents, and not till the Death of those, who stand in his Place, and are particularly interested in the Purport, and guarded against by the Intention, of it. Let it be remembered too, that neither the Pretender, nor his Family, if, by any calamitous Reverse for this Nation, they succeed in their Designs, will think themselves * bound by the Proviso in the Seventh of Queen *Anne*, nor by any Laws made since the Revolution. Why then should not the same Terrors be set on the Side of the Protestant Succession, as are in the Hands of its Enemies, and which have been the Safeguard of our Kings from the Foundation of the Monarchy?

* Since the first Edition of this Discourse, the Pretender's Son, in a Paper dated 10th *Octob.* 1745. and published in *Scotland*, has declared all the Laws made from the Time of the Abdication to be in themselves null and void.

Cicero

Cicero has Words very applicable to this Purpose: "When, says he, we are in-
" treated to have Mercy on the Posterity of
" a Traitor, what Security is given, that
" ourselves shall not undergo the most cruel
" Punishments, if the Crimes of the Fa-
" ther should prosper?" The Notions of
Cicero, occasionally scattered in his Works,
are very wise upon this Subject; and the
more to be regarded, because he never
shewed a warmth of Spirit, in Circum-
stances, which required Coolness, to perplex
the Measures, heighten the Resentments, or
inflame the Sedition of his Times; but re-
served it to second the Efforts of his own
Prudence, in conducting Affairs of great
Difficulty, and lasting Importance to his
Country. In one of the Orations he inti-
mates, in a few Words, that Laws of Ter-
ror, in the *Roman* Commonwealth, had the
Appearance of the severest Justice, with
the Intention and Effects of Mercy; "That
" the Fear might extend to all, but the
" Punishment to few*." True it is, they
contain a Power, to be exerted only in the

* *Ut metus videlicet ad omnes, pœna ad paucos perveniret.* Orat. pro A. Cluent.

Dangers of the State ; like *Goliab's* Sword in the Tabernacle, not to be taken down but on Occasions of high Necessity : at other Times it should lie sheathed and untouched in the Statute Book ; as the same great Writer phrases it, *in tabulis tanquam in vagina reconditum*. If one may judge of the Spirit of the Law of *England* by the Declarations of its Professors, it ought not to be forgotten, that my Lord *Coke* delivers no Maxim with greater Pleasure than that of *Cicero* ; and repeats it in several Parts of his *Institutes*. But the most pregnant Arguments of Lenity, and Wisdom in providing for the gentle as well as just Administration of this Power, are to be found in the Law itself.

1. In the Tenderness shewn to the Posterity of Offenders, in respect of Settlements in Trust to preserve Remainders, and Declarations of Uses on Common Recoveries. Many Families are possessed of them, especially such as are formed for great Things ; and Men, who enter into desperate Engagements, are commonly cautious enough to protect some Part of their Estates in that Manner. The Law affords Means of avoid-
 4 ing

ing the hardest and most exceptionable Cases of Forfeiture. Instead of Dower, Jointures are become general, which Forfeiture does not touch. The Grandfather may, by Will, devise his Estate in Fee-simple to his Grandson; and so may the Uncle to his Nephew, affected by the Corruption of the Father's Blood; and they are capable of taking. Nor is it of small Advantage to the Heir, that the Death of the Ancestor, before Conviction, discharges all Proceedings and Forfeitures. He can then be attainted only by Act of Parliament. It has been intimated, that the antient *Roman* Law was much harder in this Matter.

II. In the exact Justice, which is shewn to the Offender himself. And that in Two Ways:

I. By the Clearness and Certainty of those Laws, which mark out the Crime. An Overt-act of some Statute-Treason must be laid in the Indictment, and proved in Evidence by Two Witnesses, whose Competency is laid under many Restrictions for his Benefit. No Man is to be reasoned out of his Life and Fortune by subtle Analogy, and
H
rheto-

rhetorical Aggravations, inhancing Misdemeanors into Treason ; as was antiently the Case, even in ordinary Courts of Justice.

2. By the Fairness of the Trial ; the Independence of the Judges ; the Presentment of one Jury, the Verdict of another, in effect chosen by the Prisoner (considering the large Number of Challenges allowed him), to pass Sentence on himself ; admitting his Witnesses, by Oath, to the same Means of legal Credit with those for the Crown ; and the Limitation of three Years for calling any Man to Account, except in one * Case, mentioned in an Act of Parliament. These Things, as they are regulated in our Law, reconcile all the Points of Wisdom and Justice, in not making Guilt less obnoxious, but Innocence more safe. A considerable Part of the Security against the Abuse of Forfeitures is owing to that excellent Stat. 7 *W. III. c. 3.* which has, in several Particulars, improved the Trial of Commoners, and lessened the Power of the Crown in that of the Lords. The Consequence has

* The Case of a Design or Attempt to assassinate the King by Poison, or otherwise, is excepted out of the Limitation in Stat. 7 *W. III. c. 3.*

answered

answered the good Intention of the Framers, that Men might be tried for all which is dear to them, *sine judicium sævitiâ, aut temporum infamiâ*, without Cruelty in the Judges, or Dishonour to the Times. Let the Argument then against this Punishment have been formerly as specious as it might, it can scarce be colourable now. To diminish it, after giving the greatest Latitude of Defence, would furnish a real Encouragement to Treason, by making a greater Provision for the Safety of those, who are accused of it, than of other capital Crimes less pernicious, and disappointing the most weighty Sanctions of that Law, which punishes the Traitor.

III. In the Tenderneſs ſhewn to the Offender, by allowing a Reſort for Pardon in the Prerogative of the Crown. For tho' Laws are not to be framed on Principles of Compaſſion to Guilt, yet Juſtice, by the Conſtitution of *England*, is adminiſtered in Mercy. It is the great Duty required from the King by his Coronation-Oath, and that Act of his Government, which is moſt intirely his own, and perſonal. According to the Expreſſion of the celebrated Lord *Strafford*, " The King condemns no Man : The

“ great Operation of his Sceptre is Mercy.” And in an old * Record it is said, that “ his Mercy is appropriate to himself above all the other States of his Regality.” In most Republics, this Power, if it subsist at all, is so restrained, and difficultly exerted, as almost to make good the Complaint of the young Men in *Livy*, that a Man must *solâ innocentia vivere*. In *Holland*, without a Stadtholder, there is no such Power of pardoning, notwithstanding it is essential to Policy; as necessary as Justice itself; and giving it a Perfection and Amiability, which some have thought not originally belonging to its Nature. The Emperor *Hadrian* understood it so well, that, in Consideration of the particular Circumstances of *Albinus*’s Children, he granted them Portions out of the Confiscation, saying, “ That his Authority was better strengthened by gaining the Affections of Men, than by enriching his Coffers.” There is no Character more branded in History, than that of an inexorable Prince, who can suffer so divine a Power, intrusted for the Good of his People, to lie dormant. His own

* 1 H. 4 Rot. Parl. intituled, *Plac. Cor. in Parl.*

Interest is little understood by him ; and his Conduct becomes, to the last Degree, absurd, as well as detestable, if he governs a free People ; since it is not only to carry Justice, in some Instances, to the Height of Injury ; but it is, in respect of himself, to be dangerously just. In *England*, the greatest Weight has always been laid upon the Prerogative of Pardoning ; which appears from this ; that when Endeavours have been used to bound the Exercise of it, the Sense of the Nation has disapproved them in Parliament. By the Statute 13 *Rich. II. c. 1.* the King is restrained to grant Pardon of Treason, Murder, &c. but in a special Manner ; and it is made penal for any Officer of State, or Subject of the King, to intercede for such a Pardon, which also cannot pass by immediate Warrant. But three Years were hardly elapsed, before the Commons acknowledged themselves the Sufferers by that Law ; and, in the 16th Year of the same King, a very considerable Part of it is repealed. To say the Truth, this Prerogative is generously exercised amongst us, nor can it be regarded as a contemptible Abatement of the Severity of Forfeitures, both because the Law, reposing a Confidence

in the King, will not suppose him inclined to act wrong in the Things submitted to his Wisdom, and because, ever since the Union of the Two Houses of *York* and *Lancaster*, it has been employed to the Peace and Preservation of the Subject, not rigidly with-held to his Destruction. The Clemency of the Crown has appeared not only in Pardons passed under the Great Seal, but in the previous Consent always given to Bills of Restitution, as well as the final Approbation of them. The Records of Parliament, even in the worst Times, are not wanting in Examples of it; in good Times it has shone forth with the brightest Lustre. From some of those Bills we may observe, that, within a few Years after the Ancestor's Attainder, Families have been restored, as if they had merited it by their Modesty and Prudence. Hence they have been enabled to retrieve their lost Honour by memorable Services; and are held obliged to a discretionary Lenity for the Enjoyment of Inheritances, which, descending in the ordinary Course, might have provoked dangerous Emotions of Family-Pride, or partial Regard to their Ancestor; would have furnished Gratifications of Rage, or Instruments of

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Revenge, instead of composing to Peace, or raising the Sentiments of Gratitude; a Gratitude heightened by the Reflection, that these Inheritances had been justly forfeited to the Laws of their Country.

If we may consult foreign Annals on this Point, we shall find a remarkable Illustration of it related by *Mariana* *, in the Conduct of King *John of Portugal*, who, upon an Occasion, which might have urged arbitrary Princes to great Lengths of Jealousy and Revenge, tempered Justice with Mercy, to his own Honour, and the Advantage of his Kingdom. He used to say, that Government either found Princes wise, or made them so; and, being grown unpopular from a Severity of Temper, and Freedom of Expression, many of his Nobles, with the Duke of *Braganza* at their Head, carried on a formed Conspiracy against him. He concealed his Knowledge of it for some time; and, when it was breaking out into Action, seized and punished several, and their Estates were forfeited. The Duke of *Visco*, his Cousin-german, suffered for the Plot. But,

* *L. 24. c. 10.*

instead of with-holding his Estate from the Family, he engaged their Affection, by giving it to his Brother *Emanuel*, and raised up an admirable Instrument for the Good of *Portugal* and himself, in one, who might have proved a factious and alienated Subject. *Emanuel* succeeded him in the Throne, restored the Duke of *Braganza's* Children, regulated the Execution of the Laws, and brought the Wealth of both *Indies* into *Portugal*, by encouraging the Discoveries of the New World. Something like this has happened not unfrequently in Kingdoms governed at the despotic Pleasure of the Prince. How much oftener has it taken place in *England*, a limited Monarchy; and with what greater Probability will the Blessing be secured to us, since that Settlement of the Nation, which added new Life to the Liberties of the People, reduced the Constitution to its right Basis, and gave it its proper Force and Energy! In such Circumstances, we may apply to the Throne, what was said by an antient Poet, of the Altar erected by the *Athenians* to *Compassion*:

— *Mitis*

—— *Mitis posuit Clementia sedem,*
Et miseri fecere sacram ——
Huc victi bellis, scelerumque errore no-
centes,
Conveniunt, pacemque rogant——

Upon these Principles, the Objection on the Part of the Crown, as if its being invested with this Power were of no Moment to the Hopes of Families, seems rationally answered. As the Exercise of the Justice of Government is thus softened and restrained, what public Danger can arise from private Despair? And suppose the Danger to arise, is it not in Government instantly to repress such Efforts, where Justice is not distributed by Faction, but regulated by Law, applied to save the Constitution, and adapted to the Genius of the People? It cannot be denied, that, in History, there are a few Examples, but principally destructive to the Authors, in which our Princes have, in Matters of Treason, preferred dark, hurtful, and cruel Counsels, to open, wise, and just Proceedings. They are not to be insisted upon. There is a Decency required, in reciting the Faults of past Times. We may
look

look back for Information and Warning, and even for Reproof, but not Invective. An Alteration of Circumstances renders their Renewal almost impossible; and, surely, it may be said, without Offence or Flattery, that, whether it be pursued at large, or passed over in Silence, it is a Subject, which neither the most suspicious Friend can call invidious, nor the most malignant Enemy will think to be expedient, in this Reign.

The great Lawyers of the Kingdom, Men wisely and conscientiously zealous for national Rights, have expressed the highest Veneration for the Law of Treason established in *England*; and seem more concerned for the Certainty of it, than to lessen the Severity. Lord *Hale** says, “ That Treason, being the greatest Crime against Faith and Duty, is deservedly branded with the highest Ignominy, and subjected to the greatest Penalties, which the Law can inflict.” Lord *Coke*, in the Beginning of his Third *Institute*, enumerates the Names of the principal Judges, who sat in

* H. P. C. I. p. 86.

Westminster-Hall at the Time of making the Stat. 25 *Ed.* III. and those subsequent Statutes made as Opportunity offered, in Confirmation of it, to destroy arbitrary Determinations, which endeavoured to elude it. "All these, says he, we have named
 "in Honour of them and their Posterities,
 "for that they were great Furtherers of
 "these excellent Laws concerning Treason.
 "This was done, that the Fair Lilies and
 "Roses of the Crown might flourish, and
 "not be stained by severe and sanguinary
 "Statutes." Why severe, and why sanguinary? Because the Description of Crimes *, by which a Man might expose himself to Penalties, was so various and uncertain, that no one knew how to speak, act, or behave himself, in any Manner. But, had he disapproved the Forfeiture of Real Estates, in Cases of High Treason, as unjust, he never would have commended Laws, as clear from sanguinary Stains, which refer expressly to that Policy. Nor in another Place would he have said, *Lex Angliæ est Lex Misericordiæ*.

* Stat. 1 *H.* IV.

It may be mentioned, as an Argument for abolishing the Severity of the Punishment, that “ It is ill-proportioned to the Crime ;
 “ for, by the Law of *England*, Treason is
 “ intirely applied to such Offences, as may
 “ injure the Person and Administration of
 “ the Prince, or supreme Magistrate, without aiming at those which may be incurred
 “ against the People by that Administration
 “ itself, and is therefore partial and defective.
 “ By the Law of *Rome*, it is applied to such
 “ Offences, as affect the State and People.
 “ Hence the Inference is natural, that the
 “ Forfeiture of Inheritances is a Security to
 “ the Prince, but none to the People ; and
 “ consequently, as it stands in our Law, is
 “ to be compared with Forfeitures in Countries subject to arbitrary Power, and not
 “ to be illustrated from free Governments
 “ and Republics. This Opinion is favoured
 “ by *Nat. Bacon*, a partial and systematical
 “ Writer on the Constitution, who says, that
 “ amongst our Ancestors, “ Treachery
 “ against the Country was Death, and Forfeiture of the whole Estate both Real and
 “ Personal. Against the King, it was only
 “ Loss of Life and Personal Estate :” From
 “ whence

“ whence he concludes, that Majesty was
 “ not in those Days arrived at its full
 “ Growth.”

Without examining how far this Fact is truly stated, and the gradual Progress of the Royal Prerogative, the Proposition will admit an easy Answer upon legal Notions; yet, easy as the Answer may seem, it leads to Matters of a very high Nature, and perhaps such, as ought not to be treated anywhere, nor can be treated in a Manner equal to their Extent and Importance, but in a Court of Law, or in full Parliament. However, whilst they are treated upon the Principles of the Constitution, as pointed out in our Laws and History, the entering into them, tho’ imperfectly, may be of Use in this Question, and prove a Satisfaction to some Minds. The King is considered, in Law, in two different Capacities, the Politic, and the Natural. In his Politic Capacity, he never dies, nor is subject to Infancy; is under the happy Inability of doing wrong, because acting by his Officers, and limited by Law; combines Characters and Powers of such a Kind, as to make him one of the Three Estates in the Constitution; and forms
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that Estate which gives Life and Motion to the rest. He represents the Kingdom in transacting with foreign Countries for the Purposes of Peace or War. He has a Controul in the making of Laws; and when made, without his Administration of them, they are a dead Letter. He is the Fountain of Honour, Justice, and Mercy. The executive Power of the Government is lodged intirely in his Hands; and for this Reason Offences are referred to him, as being in Contempt of that Power, and to be punished by it. Treasons which concern the Representation of his Authority, or the Instruments, that convey it to the People, as his Seals, his Coin, and certain great Magistrates in the Execution of their Office, relate to the Allegiance, which the Subject owes him in this View. In like Manner, Treasons, which concern the Safety of the Kingdom in respect to foreign Invasion, or open Rebellion, or secret Conspiracy; in a Word, all Crimes of a public Nature, and even Injuries to private Persons, are supposed to be against his Peace, Dignity, and Crown. So that, what in other free Countries are called Laws relative to public Crimes, or Crimes against the State, pass in *England* under

under the general Denomination of *Placita Coronæ*, or Crown Law.

Nor can the Statute Law of Treason be reasonably charged with Defects, as only comprehending Cases in which private Men oppose themselves to the Authority of Government; since several Abuses of that Authority itself fall within the Care and Reach of it. If a Governor of one of the King's Fortresses should surrender it out of Treachery to an invading Enemy; if a Secretary of State, employed to negotiate Matters preparatory to treating with an Enemy, at the Close of a foreign War, should receive Bribes, and betray the Interest of the Realm in concluding the Treaty; would not both the Governor of the Fortress, and that Secretary of State, be guilty of High Treason within the Clause of * *adhering, and giving Aid and Comfort to the King's Enemies*? It is scarce consistent with that Modesty, which the Professors of the Law observe in putting Cases relative to Statutes of this Kind, to propose any other than those, which have existed in Fact, or fall clearly within the

* Stat. 25 Ed. III.

Letter of them. But some will think it necessary to the Illustration of this Argument, to put a stronger Case, in which the personal Commands of the King will not exempt a Minister from the Charge of High Treason. Suppose then an Officer of the Crown, under Colour of the King's Commands, should issue Commissions contrary to the Bill of Rights, to raise an Army in Time of Peace, without the Consent of Parliament; and engaging a Faction in the Scheme, should assemble Troops together, procuring Loans from the People, by the Terror of them; what would the Offence be deemed? Were a Bill of Indictment for High Treason found on this Matter, the Judges in *Westminster-Hall* might have no Doubt upon it in their private Thoughts; and yet, by reason of the unexampled Nature and Consequence of it, would transmit the Record into Parliament, and obtain their Declaration, agreeably to the Wisdom of that great Act 25 *Edw. III.* which recommends this Method to them as the safest in such Cases, before any Proceeding to Judgment. When it came before the Parliament, a strict Attention would be given to those uniform Resolutions of the best Times on the Clause of *levying War,*

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as particularly in the Case of assembling to throw down all Inclosures generally throughout the Kingdom, or all Meeting-houses, the first during the Reign of *Q. Elizabeth*, the other during that of *Q. Anne*; from which it appears, that it is War against the King, when intended for the Alteration of the Laws and settled Government. It would perhaps be said in the Two Houses, though formerly an Abhorrence was expressed in the *Militia Oath, of taking up Arms by the King's Authority against his Person; yet since the Repeal of the Clause in the Act prescribing that Oath, it cannot be extravagant to affirm the Converse of the Doctrine, that it is unlawful, and even treasonable within the Statute, to take up Arms by Warrant from the King's Person against his Authority. The producing of a Paper under the King's Signet, which might be called the Warrant, is no Justification. The Law not only construes it to be void, but supposes it not the Royal Act, nor will receive it in Evidence. And if sufficient Overt-acts can be fixed upon this Officer, as the Instrument to execute the Purport of it, he is answer-

* The Oath was appointed 13 & 14 *Car. II. c. 3.* and repealed 1 *W. & M. c. 8.*

able for it : such being the Wisdom of the Constitution, as when it has invested the Crown with the largest Powers of Action, to make the Instruments and Organs of those Powers account for the Abuse, or the exceeding of them, at their own Peril ; and thus they become a Kind of Controul in the very Exercise.

As to Offences of a lower Kind (which ought never to be construed into Treason, where the Statute will not warrant it), such as the evil Advice of Ministers influencing the King, not indeed to exceed the Limits of his Power, but to abuse the Discretion with which his People have intrusted him, the Proceeding by Impeachment of the Commons for high Crimes and Misdemeanors, is a complete Remedy, and according to the Degree and Height of the Offence, the Judgment may be proportioned in Parliament.

Now if any one think, in case the King should unhappily and obstinately interest his Person, in supporting the Actions of his Ministers against the clear and established Laws of the Land, that the Principles of a
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Constitution, so limited and controuled in all the Parts of it, seem to warrant the providing of a judicial Remedy against him, as against another Magistrate or Minister of State; the Answer to this Chimæra is plain; That every Constitution of Government has its peculiar Cases tending to Dissolution, beyond the Power of any stated Remedy, even tho' it be the mixt Form of Government, which both avoids those, to which other Forms are subject, and is less frequently in Danger from such Convulsions, as are proper to itself. The *English* Government therefore, notwithstanding its durable Nature, and singular Advantages, partaking in so large a Degree of Monarchy, the Case here proposed would be a Case tending to Dissolution, not to be subjected to the ordinary Provisions of Law. The Reigns of *Charles I.* and *James II.* are Evidences of this. And it arises from the Nature of the Thing; because the King of *England* (unlike the Kings of *Sparta* or *Arragon*, with their *Ephori* and *El Giusticia*, Officers appointed to inspect and judge their Actions) is not only a Magistrate or General, but composes an essential Part of the Supreme Power. So that, on the one hand, should a future King

attempt to subject the Crown and People to a foreign Yoke, or to set up a general dispensing Power by Proclamation, to controul the Operation of all the Laws ; these would be Cases manifestly tending to Dissolution. Or should he summon the Lords to assist him in the making of Laws without the Representative Body of the Commons, and the Lords, instead of mediating, should support him in the arbitrary Design of excluding the Commons from a Share in the Legislature, it would be a Case tending to Dissolution. And tho' the Law will not suppose the Possibility of the Wrong, since it cannot mark out or assist the Remedy ; yet every Member of that Representative Body might exclaim in the Words of *Crassus* the *Roman* Orator, when he opposed the Encroachments of a tyrannical Consul on the Authority of the Senate ; *Ille non Consul est, cui ipse Senator non sum* : He is no King, to whom we are not an House of Parliament. On the other hand, should the Representative of the Commons, like that of *Denmark*, surrender the Rights and Liberties of the People into the Hands of the King, and the King, instead of dissolving the Parliament, should accept the Surrender, and attempt to maintain

maintain it, contrary to the Laws, and to the Oath of the Crown; or should the Two Houses take the Power of the Militia, the Nomination of Privy-Counsellors, and the Negative in passing Laws out of the Crown; these would be Cases tending to Dissolution: That is, they are Cases which the Law will not put, being incapable of distrusting those, whom it has invested with the Supreme Power, or its own perpetual Duration; and they are out of the Reach of Laws, and stated Remedies, because they render the Exercise of them precarious and impracticable. This Observation may be applied to every similar Case, which can be formed in Imagination, relative to the several Estates; with this Difference, that it holds strongest as to the King, in whom both the Common and Statute Laws have reposed the whole executive Power: Nor could the least Branch of it be lodged in the Two Houses, for the Purpose of providing a judicial Remedy against him, unless the Constitution had erected *imperium in imperio*, and were inconsistent and destructive of itself. Should it then be asked, What! Has the Law provided no Remedy in respect of the King? and is the Political Capacity thus to furnish an Exemption to

him in his Natural, from being called to Account? the Law will make no Answer, but History will give one. When the King invaded the fundamental Constitution of the Realm, the Convention of Estates declared an Abdication, and the Throne vacant. Indeed the Political Character, or the King considered as an Estate, still subsisted in * Notion and Judgment of Law; the Right of the People to be governed by a limited Monarch,

* If it be thought, that this is a legal Subtilty, resembling the substantial Forms of the Schoolmen, which might subsist when the Matter was gone, it may be said, that though Subtilties can answer no good Purposes in Philosophy, yet they sometimes answer very great and excellent Purposes in the Law, as particularly in this Reasoning applied to the Case of the Revolution. The Result and strict Consequence of the Instances of Mal-administration, called, in the Votes of the Convention-Parliament, Endeavours to subvert the Constitution, was, that the whole Frame of it was in Fact dissolved; since the Constitution is a mere *Ens rationis* without the Exercise of the Government, and the Lords and Commons cannot be regularly convened, nor exert any Powers without the Concurrence of the King. But had there been a Declaration, that it was dissolved, the People must have been free to chuse a new Form of Government; and all the Usurpations, under which they had suffered, after abolishing the Monarchy, and the visionary Schemes of Government, which the fruitful Fancy of that Age produced upon the Death of *Charles I.* and of *Cromwell*, would have been again revived, to the Disorder and Ruin of the Nation. What then said the Convention?

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Monarch, according to the ancient Exercise and Distribution of Powers between the Three Estates, remained as much as ever: but the Exercise of the Government was suspended, which made it a Case tending to Dissolution. And being extraordinary, the Remedy suggested itself, and was suited to the Necessity.

From the Whole of this Argument, thus stated, it will appear, upon what wise and

On the one hand, they put an End to any Hopes, which might have been raised in favour of the unhappy Prince, from the Confusion naturally consequent on a declared Dissolution; and, on the other, disappointed the unma- tured Schemes of ambitious or speculative Republicans, by immediately shewing it to be their Opinion, that the Constitution subsisted. They met, and transacted in a Manner as near to the antient Customs, as Circum- stances would admit; then declared a personal Abdica- tion of the Monarchy, and supplied the Defect by placing another on the Throne. On this Account it is, that the Cases here proposed, instead of being called Cases of absolute Dissolution, are only said to be Cases tending to Dissolution. So far the History of the Revolution leads, and it carries us no further. Mr. *Locke*, in considering the Subject as a Philosopher and Theorist, speaks of such Cases, as absolutely dissolving the Constitution of Government; so as that the Question with the People would be on the Creation of a new one. But the Law- yers of those Times did not carry it so far; and the Reason, why they did not, was a Master-stroke of Po- licy and Wisdom.

constitutional Grounds the King may be said to be a Corporation by the Common Law. And it will not be foreign to the Question, to pursue the general Notion of Law concerning the King a little further, to distinguish between the two Capacities, and to shew, in few Words, that there is nothing annexed either to his Crown or Person, which may not be explained to have a more immediate or remote Reference to the Dignity of that Relation, which he bears to his People. For tho' it be observable, that his Natural Capacity imparts some Peculiarities to his Politic, and especially this, that it causes the Crown to go by Descent (which is the Case of no other Corporations, whether consisting of many Persons or of one, whether temporal or ecclesiastical, who take to them and their Successors, not their Heirs); yet this Peculiarity is allowed by Reason of the Politic Capacity, and arises ultimately from that Wisdom, which, from the earliest Times, determined so many Nations to prefer Hereditary to Elective Monarchy.

It is owing to the Dignity of the same Politic Capacity, that some Restrictions are laid upon the Natural, or such ample Privileges

vileges annexed to it. Of the first Sort, it may suffice to mention, that the King cannot be seised to an Use ; not only because Corporations are not enabled for that Purpose by the Statute of Uses, but for a Reason at Common Law given by Chief Justice *Markham* in the * Year-book of *Edward IV.* because he ought not to be joined as a Party and Trustee in Defence of the Estate of one Subject more than of another. Of the latter Sort, it is very important, that should the right Heir to the Crown happen to be an Alien, nevertheless the Descent has its free Course; lest there be an *Interregnum*, which the Law will not suffer. For this Cause it is, that the Safety of the King's Person is protected with a superlative Care. It is High Treason to compass or imagine his Death. This Protection is even extended to Relations, the Queen, and his eldest Son. Acts of Parliament respecting them are to be taken Notice of by Judges as public Acts, without being pleaded. Hence it is, that his Prerogative for acquiring and preserving his private Rights is proper to himself, and out of the ordinary Course of Law, in other In-

♦ 7 *Edw. IV.* fol. 16.

stances.

stances. Notwithstanding he be only of the Half-blood to the King last seised, the Crown Lands and Jewels descend to him. They cannot be distributed in Coparcenary among Females. Where Land comes to him by Descent from a collateral Ancestor, being a Subject, he inherits it in his Natural Capacity; but shall hold it *jure Coronæ* in his Politic, and it shall attend upon the Possession of the Crown. Purchases made by him, after the Accession of the Regal Dignity, vest in the same Capacity. He gives and takes only by Matter of Record; and even during his Minority he may make Leases and Grants, and shall be bound by them, for the Advantage of his Revenue, and to reward Merit. His Goods and Household are intitled to Exemptions; and in Courts of Justice he enjoys many Privileges, yet so, as not to deter the Subject from contending with him freely.

Now tho' these two Capacities cannot be separated in the Administration of the Government, yet are they distinct in themselves, and ought to be divided in Argument. To say then, that the State and People are not considered in our Law of Treason,

Treason, because it is referred to the King, is either to lay such a Weight upon Forms of Expression, as deserves no other Answer than repeating the old Observation, *Dum proprietatem verborum expendimus, sensum veritatis amittimus* ; or else it is to confound the first Principles of absolute and limited Monarchy. In absolute Monarchy (considered as a corrupt and despotic Form of Government), the Proposition is true, that Treason is applied merely to the Person and Administration of the Prince, without Reference to his People : and the Reason is obvious ; because, in such a Government, his Natural Powers are co-ordinate with, and the Measure of his Political : Will and Pleasure are the only Rule of his Actions. But in a limited Monarchy, like that of *England*, where both the public and private Prerogatives of the Crown, applied either to the Political Capacity, or to the Person of the King, are instituted and exercised for the Benefit of the People, and to support the Dignity of his Office, the Proposition is false ; and to advance it in any Manner, is to set up a confused fantastical Notion, contrary to the Ground of Law.

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If therefore a sufficient Analogy remain between the Law of Treason in other free States, and the Law of Treason in *England*, the Question naturally occurs, What can be the Meaning of Treachery against the Country, or State Treasons, so much talked of by some, in Contradistinction to those marked out by the Law of *England*? It is difficult to find a Meaning, except one, of which the Consequences are such, that had **N. Bacon* seen them, as a consistent Republican, he must have immediately disowned it. The free and inquiring Spirit of this Age has led Men to search the antient and forgotten Parts of History for Epithets and Parallels to Ministers. They have read, how, in one Part of *Britain*, before the Act for improving the Union, a Man might be accused of High Treason, under a Law against “impugning the Authority of the Three
“ Estates, or procuring any Innovation or
“ Diminution of it.” They have read, how the *Spencers* in *Edward* the Second’s Time, *Mortimer* in the Reign of *Edward* the Third, the Duke of *Gloucester*, Earl of *Arundel*, *Tresilian*, and others, in the Reign of *Richard* the Second, were convicted of

* P. 108.

Treason in Parliament, as the Record sets forth, for “ accroaching Royal Power, sub-
“ verting the Realm, and fundamental
“ Laws ;” Expressions which sound well in Party Papers, as the Sportings of Fancy, to exercise the Sagacity, and flatter the Vanity, of Readers ; but, when used as the adequate Description of Treasons in Courts of Justice, become too serious, and may be attended with the most fatal Mischiefs. Under such general Words arose all the Common Law, or State Treasons, constructive and arbitrary Treasons ; into which every Offence, that either was, or seemed to be, a Breach of Allegiance, and the Laws, might be raised by Interpretation and Consequence. These have long been Strangers to the Kingdom, ever since Lord *Strafford*’s Attainder, and above Two hundred Years before ; and it is to be expected, from the Wisdom and Justice of Parliaments, ever will be. Let these be as studiously avoided, as the declared ones enforced ; and surely it would be a very ill Exchange in a free Government, to diminish the Forfeiture at the Expence of that Certainty, which the Law has given to the Crime. As the Penalties, of which so much has been said, are at present applied by Statute,

tute, those, who mean well to their Country, and take care to inspire their Posterity with the same good Intentions, can suspect no danger to Innocence ; and they will think it of little Moment to solicit the Approbation of those, who do not. Yet if one might suppose State Treasons revived, and founded, as they were antiently, on intemperate Words, Misdemeanors, and dubious Offences, who would engage in public Business, that values Repose, has Wealth to forfeit, and Dignities to aggravate his Fall ? A mistaken Opinion, that he was acting within Law, might be the Ruin of him ; and it would become a regular and necessary Part of the Proceedings, as formerly in *Scotland*, to argue, in a solemn Way, the Relevancy of the Charge, before any Evidence was offered of the Fact. But it were better to have no Law, nor Penalties to enforce Law, nor the very Form of Civil Society, than to receive only an ensnaring Protection from it.

And now it may be urged, that “ The
 “ Protection given by Society must conti-
 “ nue to be ensnaring, whilst the Law in
 “ Controversy subsists. Artifice may pos-
 “ sibly

“ sibly be used by ill-defigning Ministers
 “ to involve innocent Men in Treason, for
 “ the sake of Confiscations.” If this Ob-
 jection be attended to in all its Consequences,
 the Answer to it, one might hope, will be
 thought as satisfactory as the Nature of the
 Thing can admit. For tho’ Instances may
 perhaps be found to warrant the Assertion,
 under Governments cast in another Mould,
 under Laws of greater Latitude, nay, even
 in our own History during Civil Distrac-
 tions, and Times of High Prerogative ; yet
 is not the Force of it much abated by the
 different Lights in which the Crown and
 the Subject have regarded one another, and
 the equal Terms on which they have stood
 for many Years? Is not the Law of Treason
 clear, the Course of Proceeding exquisitely
 adapted to protect Innocence, to intimidate
 or repel Malice? Has not the Security against
 the undue Exercise of the Prerogative, both
 in Point of Rigour and of Lenity, been
 greatly strengthened since the happy Revo-
 lution? Are not new Advantages given to
 private Men, accused of High Treason at the
 Suit of the Crown, during Trial ; and does
 not Access to Mercy lie open thro’ the whole
 Proceeding? But when Ministers or Fa-

vourites are impeached at the Suit of the Commons, is not the Constitution of Parliament as strict as it was antiently? or, since the Act of Settlement took place, can any Pardon be placed in Bar of an Impeachment? Do not annual Sessions of Parliament, which in Reigns immediately preceding the Revolution, were frequently interrupted, afford perpetual Opportunities to check all the Extravagancies of inferior Officers and Courts? In a Word, has not Justice had an uncorrupted Course in its known and stated Channels, whilst those of Mercy have been enlarged, and the Current has flowed purer, and more freely, than the Memorials of past Ages can boast? Shall then such Suggestions be raised after this Experience, and the reasonable Prospect, both of the Continuance and Improvement of these Blessings, if we are just to ourselves, and grateful to Heaven?

But let it be said again (for there is no Reason to decline the very Point of this Argument), that the Law ought to be abolished, because Ministers may possibly abuse it, who first invent Plots for their own Purposes, and afterwards ruin the Innocent by false Charges.

And

And who knows not, that this is the idle Whisper, the stale Infination of real Conspirators, to delude well-meaning Persons into a Belief, that such Plots are easily forged, and the Forgery as easily supported? Whereas, were the Artifice attempted by Ministers in this Country, it would be attended with peculiar Difficulties, from the Nature of the Government, beside those general ones, which the common Accidents of Life suggest, arising from the stubborn Genius of Truth, and Constitution of Things. Indeed the Abuse is (strictly speaking) possible; but do we not govern ourselves in the tenderest Concerns, and do we not live, by Probabilities? Reason thus on other public Points, and suppose Princes, or those entrusted by them, to have the smallest Interest in abusing the Exercise of Power, tho' it be an Interest, to the last Degree, imaginary and ill-understood, as in this Case; and you will wrest all Parts of the Administration from their Hands, dissolve Civil Policy, and leave each Man to govern himself, because every Kind of political Power is accompanied with Temptation. Reason thus in private Conduct, and you must hide yourself from the Eyes of the World; lest Falshood may
K blast

blast your Character, and Malice may oppress your Fortunes. The Saying is, and it deserves to be engraven on the Hearts of Judges, That it is better ten guilty Men should escape, than one innocent suffer : But the Saying is not, That it is better the strongest Terrors be neglected to secure Government against its guilty Enemies, because a bare Possibility remains, that they may be unjustly held forth to the innocent Friends of it. As if it were not the main Care of Government to provide for its own general Safety, in which that of good Subjects is involved : Certainly the next Care is, to procure such particular Safeguards for the Honest, as it can. But, when this is done, let every one reflect, that he, who lives in Society, is exposed to innumerable Hazards from the Workings of Envy, Revenge, and Defamation. Laws can give a very incomplete Security against them. On what, then, does he every Day rely, and on what can he better rely, than on the Steadiness of his Prudence, the Clearness of his Heart, the universal Experience, which decides for the Safety of Innocence, and the Order and Course of Providence ?

After

After all, it will be asked, " Suppose there
" had been no Forfeiture by the antient
" Constitution, would it have been thought
" right to institute it now ?" This Question
can scarcely be answered. Who knows what
Sanctions may be requisite for Government
in some Periods? As the antient Discipline
of *Rome* degenerated, new Terrors were ex-
pedient on the Side of Law. Yet it is one
Thing to take off old Restraints, another to
impose new. And the Conclusion is not
just, that because the Doubt might be con-
siderable for Reasons of Policy, whether such
a Severity should be tried in the first Instance;
therefore it ought to be abrogated, after the
wholesome Effects derived from it, and the
Approbation of Ages. There is nothing in
the Virtue of the present Times, which
claims so particular a Respect. It is ob-
served by *Cæsar*, in his Speech against put-
ting the *Catilinarian* Conspirators to Death,
that those, who spoke before him in the De-
bate for superseding the ordinary Forms of
Law, had caught the Attention of the Se-
nate, by pathetic Descriptions of Sacrilege,
Rapine, and the Ruin, which must have en-
sued to the Commonwealth, had the Treason
been effected; to which he opposes the

Danger of Deviations from the old and regular Method of proceeding. Certain it is, the honest Senator, not interested in the fortunate Success of the Conspiracy, as History has supposed him to be, thought that Danger of the most Weight, which he attempted to diminish. *Cæsar* had a difficult Part to take, and more Art could not have been shewn upon the Subject. But had he lived in this Age and Country, to defend the Abolition of Forfeitures, he would modestly have owned the Difficulty too much for his Art, in a Case where the Danger of encouraging Traitors concurs with that of removing Foundations, to invent Arguments against such, as arise from a Regard to, that supreme Law, the Safety of the People; and to that antient Method of punishing, which scatters salutary Terrors round the Throne.

These Reasonings may appear to some more than sufficient. Yet, perhaps, others will not be wanting, who may think, that, “ by the Dread of this Severity, Resistance
“ will be made very difficult; and it is a
“ Maxim of Politics, that Governments
“ ought to be calculated with a View to
“ the Infirmities of those, who govern.”
The

The Maxim is true; but never was extended to prove it necessary, that Resistance should be easy. No Form of Government can be carried on, unless a high Degree of Confidence be placed in it. Every Form is liable to Abuse; but ought not, for that Reason, to be exposed to Ruin. Religion itself, tho' of the most perfect Purity in its Origin, and not of human Institution, has been made a Cover to the worst Purposes. And yet who ever said, there should be no such Thing as Religion for a Controul to Men's Actions? Even putting the Argument in the strongest Light, and suppose the Form of Government ever so unrestrained, Resistance ought to be difficult. If it were not, Men might be inflamed by slight Faults, by personal Affronts, by private Sufferings, to disturb their Country. And when we consider, in the best Cause, what Confusion, what Violence, what Cruelty ensues, it cannot be thought on without Horror. Perhaps too it may be fairly said in Answer to the Objection, and the better to satisfy those who make it, That in the worst Juncture of Affairs, when the Constitution is affected, when tyrannical Designs are openly avowed, and supported by every Injustice, the Dread

of this Severity will not create a Terror sufficient to prevent good Men from resisting : On the contrary, by inspiring Caution, and retarding Resistance, till it is become mature, it may facilitate and secure the Consequences. A Man's Fears always bear Proportion to his Hopes; and one Kind of Passion, or Weight of Considerations, is balanced with another. In good Times it is admitted, when Men are moved by Ambition or Resentment, private and partial Affections, they will be deterred from engaging by private Considerations. But in bad Times, when they are moved by a Love of Liberty, Order, and the common Good, Arguments addressed to private Fears will not weigh down public Affections.

Once more: The best Answer to this Objection is still behind, That it proceeds upon Notions contrary to common Experience, and either destructive of Law, or inconsistent with the Nature of it. It proceeds upon a Notion contrary to common Experience, as it supposes those, who are entrusted with Government, more likely to abuse their Authority in an intolerable Manner, than some of the particular Persons, who owe it

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Allegiance, to endeavour a Change, or a Subversion of it. It proceeds upon a Notion destructive of all Systems of Human Law, as it supposes an Expediency of weakening those strong Sanctions, which have been employed in every Country, to give them their due Force and Operation. The Checks upon Government should be of another Kind from those designed by this Objection. Let us keep the Balance as even as we can, by forming every Estate in the Constitution a Controul upon the rest; but it is extravagant to think of leaving the least Strength or Temptation to Individuals to controul Government itself. It proceeds likewise upon Notions inconsistent with the Nature of Law in two Respects: 1. As it implies an Error in Theory; that a Lawgiver, framing a Scheme of Government, should pay as much Attention to the possible Dissolution as to the necessary Support of it; and, instead of securing Obedience and Perpetuity to it, by the strongest Sanctions, which Wisdom can devise, or Justice will admit, ought to weaken those Sanctions, for the Sake of Cases which are out of his Reach, and must be left to themselves, in which both Law and Government are dissolved. 2. As it implies

an Error in Fact; that a Law for Punishment, as that of Forfeiture, or a Law for Indemnity, as one made to abolish Forfeiture, can operate in Times of Civil Disorder, as in Times of Peace, either to give Terror or Protection. It has in it the first of these Errors, because, in supposing, that the *English* Legislature ought to abolish the Forfeiture of Inheritances for Treason, it implies, that they must provide for Cases of extreme Necessity and Dissolution, and, as it were, enlarge the Right of private Judgment concerning those Cases, by taking off the strongest Checks to private Resistance. It has in it the second Error considered in either Light. On the one hand, should this Law of Forfeiture be preserved, a justifiable and national Resistance (such as that at the Revolution) will not be attended with too much Difficulty and Terror: For when those, who are entrusted with the Executive Power, have abused the Design, or exceeded the Measures, of their Trust, there generally follows a Weakness in the Hands of Government, which renders it unable to exact the Forfeitures originally intended to secure it. On the other hand, should the Law made to abolish Forfeiture take place, what Protection will be derived from the
Abolition

Abolition of it in Times of Civil Trouble? *Silent leges inter arma*, was *Tully's* Aphorism, suggested by his own Experience, and supported by that of all Ages. It is true, Men might be induced by this Abolition to shew a greater Readiness to take Part, or even to lead, in Measures of Resistance. But in the End it would prove a Snare to their Destruction, instead of a Security. Will the Conquerors in a Civil War think themselves bound by such a Law? If one may argue from Fact, clearly not. They will inflict these, and much greater Severities, on the Conquered, without regard to the antient Constitution of their Country, both from Policy and Revenge. When the Troubles of *Greece* ceased, with the Surrender of *Athens*, at the Conclusion of the *Peloponnesian* War, the Thirty Tyrants exercised Cruelties against those who wished ill to their Authority, unknown not only to the Laws of *Athens*, but to those Laws, which cemented the general Union of the States. In *Rome*, the Proscriptions of *Sylla*, and the Second Triumvirate, were contrary to the Genius and antient Policy of the Commonwealth, tho' accommodated to the Situation and Interest of the Leaders. In *Florence*, the Banishment

nishment and Extirpation of entire Families, and the Confiscation of their Substance, was a frequent Manner of Proceeding during the Troubles of *Italy*, so excellently described by *Machiavel*; to which Severity it was owing, that many joined with the Duke of *Milan*, a Foreigner, in order to be restored to their own Country. But it was a Proceeding exercised in particular Instances, according as one Faction or another prevailed, not derived from a permanent Law or Policy of that Republic, or grounded upon stated Crimes. Can then any Argument be drawn for abolishing this Law, from the Security, which that Abolition may give to private Men, in such Periods of Time; or ought any Inference to be made from the accidental Severities of Civil War, to the equal, and regular, and peaceable Administration of Justice?

Yet still it may be added, That “ if the
 “ Forfeiture of Inheritances were taken
 “ away, the Unfortunate in Civil Troubles
 “ would find it a favourable Circumstance,
 “ to have the Law on their Side, to inter-
 “ pose between the Distress of their Condi-
 “ tion, and the Fury of their Adversaries.
 “ With

“ With that popular and healing Intention
“ was the Statute 11 *H. VII.* framed, by
“ which the Obedience to a King *de facto*,
“ or in the very Words of it, the Prince and
“ Sovereign Lord for the Time being, is
“ made lawful.” But he, who thinks on
this Subject, will observe, that it is one thing
to make a Law, which encourages a general
Obedience to Government, and another to
make a Law, which in its Consequences may
weaken the Bonds of that Obedience. Be-
sides, the Circumstances of *Henry* the Se-
venth’s Family and Reign required the one;
the Circumstances of this Royal Family and
Time by no means allow the other. Let it
be supposed however, that the Time would
bear it; yet the Reasoning just used, to shew
how little Protection would be derived in
Civil Troubles from the Abolition of this
Forfeiture, will receive great Confirmation
from considering what have been the Con-
struction and Effect of the famous Law of
Henry the Seventh. The natural Construc-
tion should seem to be that, which is most
for the Benefit of the People, to heal and
compose Civil Differences. And it is the
settled Rule, that Laws made for the Attain-
ment of such public Ends shall be expounded
in

in the largest Sense ; and tho' the Words are short and imperfect, yet they shall be extended so, as not to be illusory and vain. Under this Rule an Equity has frequently been admitted in Statute Laws against the Letter. Now the general Intention of that Law was plainly to indemnify the Subject, who should not only submit to an usurped Authority *de facto*, but should be active in supporting it. The Words of it suppose a Kingly Government, and are applied to the Allegiance and Service, which shall be paid to the Prince upon the Throne. The Reason of which was, that none of the antient Contentions had ever ended in the Republican Form of Government, and the Law was accommodated only to the Experience of past Times. But the Mischief might subsist in Cases not expressed in the Words, and the Remedy might, in the reasonable Methods of Construction, be made adequate to the Mischief. It is remarkable however, that in the single Case, which has happened since the making of that Law, in which the Subject could apply it to his Benefit, it has received a strict Construction. For, after the Restoration, many, who were called to Account for submitting to the usurped

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Authority, insisted upon the Equity of the Statute ; but it was denied them ; and they were told, 1. That the Statute supposed a Monarchy to be the Medium of the Executive Power, and provided only for a King *de facto*. 2. That tho' the Authority *de facto* subsisted, and was submitted to for a Time, yet it was usurped wrongfully by a Party, and every thing done under it was void in Law ; the very Question, which that Law of *Henry* the Seventh was intended to preclude. Indeed the Act of Indemnity, after the Restoration, proceeds on the Supposition of Illegality in the Proceedings of the late Times, not only as to the High Courts of Justice, but in every Part of the Government ; and leaves those, who are excepted, to be prosecuted as Traitors at Law. This is a Declaration in Parliament, which seems to prevent the equitable Construction of the Law of *Henry VII.* and evinces, in a great Measure, what is here advanced, that from the Nature of Civil Commotions these Acts of the Legislature will always prove a very weak Support to those, who lean upon them : Questions of Law will be blended with Questions of State, and both be governed by Reasons of temporary Convenience. The
wise

wife Historian of *Henry* the Seventh's Reign was so sensible of this, that, speaking of the Statute concerning a *de facto* King, he intimates, that it was not likely to last, but made to satisfy for a Time; and calls it "a Law of a strange Nature, more just than legal, and more magnanimous than provident." Words very applicable to such an Alteration of the Constitution, as these Objectors demand.

This important Subject has now, in some Manner, been viewed in all its Parts. The first Endeavour was to clear it of Circumstances, which do not belong to it in *England*; and from which have arisen the general Censures upon it, to be found in the celebrated Histories of Civil Wars, and the Writers on Liberty. The Foundations of Reason, on which this Part of the Constitution is established, have been exposed to View; Natural Right separated from Civil Right; and the latter shewn to be alone concerned in the Creation, and consequently in the Forfeiture, of Inheritances. The General Policy of Law has been illustrated from Free States, as the Power of inflicting this Penalty is most strongly binding on human Nature:

Nature : The particular Policy of Government has been marked out as distinct from Policy of Law, in respect to the Manner and Circumstances attending, and the Effects arising from the Administration of this Power.

To conclude : Such a Terror against Treason was peculiarly adapted to those Ages, in which it has either been introduced or enforced. It was fitted of old to the Genius of this brave People, who, despising their own Lives, were only to be moved by a generous Regard to their Posterity. It is fitted to the Genius of these Times, when Persons are to be touched in that dearest Part, themselves and their Families ; and the Love of our Country is held a Weakness, and mistaken Principle of Action. Men will be made averse to desperate Engagements, by a Tenderness, which, whether derived from Instinct, Vanity, or Virtue, is of equal Moment. They pretend to be against the Continuance of this Terror from the same Tenderness ; not aware, that to confess the Power of the Affection, is to vindicate the Wisdom of the Law. But, to speak plainly, Reason has marked out the due Office of
this

this Affection, as of all others. When separated from the Pursuit of public Good, nothing can be more false and dangerous; when united with it, nothing more just and beneficial. Nay, the fullest, as well as truest, Indulgence of the Affection arises from this Union. The Honour of a Family is less obscured by the Punishment than the Crime; and whoever regards his own Fame, and their lasting Interest, will best provide for both, in laying every Check on the malignant and deceitful Passions, which produce the Crime, and in assisting to maintain, by the most affecting Sanctions, the Tranquillity and Safety of his native Country. Nor let it be called Court-Adulation and Cowardice to secure these extensive Benefits. What is Flattery, and what is Cowardice, but either artfully to indulge, or tamely submit to, the Passions and Humours of Men, against Reason, and the Dignity of human Nature? But, if that be Flattery in public Conduct, which can bear a rational Examination upon Principles of Liberty, strengthens the old Foundations, supports the legal Awe and Authority of Government, every wise and honest Man would be placed in the Rank of such Parasites.

Could one of this Turn of Mind pry into the Depths of Futurity, and see any of his degenerate Family entertaining traiterous Designs, his Grief would be considerable, but his Indignation would be greater. He would grieve to see the Fruits of his Industry sacrificed to the Ambition of one ; but he would call to mind, that as they were acquired, enjoyed, transmitted, by the Protection and Favour of Society, they were due to the public Safety, when abused to the Destruction of it. He must receive Pleasure from reflecting, that the Law of his Country would so far regard his Honour, as not to own the Traitor's Descent from him ; and tho' he would compassionate an innocent Posterity, yet knowing the Law to have the Resources of Clemency, as well as the Severities of Justice, he would hope, that these might merit Restitution by their Temper and Innocence ; or, at least, run the Race of their Ancestors, and gain new Riches and Honours by the same Virtues.

Instances there are in History, in which Nations, jealous of their Privileges, have consented by new Penalties suited to an Occasion, and more strongly enforced, than

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any,

any, which the Law of *England* furnishes, to secure the Government established. *Henry* the Third of *France*, a Prince of the mildest Nature, as *Davila* and *Mezeray* inform us, in a full and free Convention of the States at *Blois*, being much pressed by the League*, enacted the severest Laws against Treason. It is true, those Laws did not save him; but he owed his personal Ruin to Qualities from which no human Means can save any Man; to his own ill Judgment and Baseness, and to the strange Enthusiasm of the Bigot, who by Surprise assassinated him. Besides, in respect of his Cause and Family, those Laws could have little or no Effect, being untimely made, not to prevent a Mischiefe only foreseen, or rising at a Distance, but to remedy one that was instant, and grown too strong already; and to deter a Party, whose Chief was almost equal with the King himself, and which was supported by a considerable Body of the People, intent to preserve the Succession to the Crown in Princes of the National Religion. Yet, be this as it will, if the Instances of this Kind are not rare, and sometimes have proved successful, the rather ought we to confirm

* *Briffon Code d'Henry III. L. 8.*

antient and constitutional Terrors, for the Prevention of a Mischief, which can only become formidable from a careless Contempt of it, and to set them on the Side of that Establishment, which is fixed on the Principles of the Constitution itself, and which has so often employed in its Defence the Wisdom of Parliament, the Affections, the Wealth, and Valour of the whole Nation. Most of the civil Troubles, which have filled the Annals of our Kings with so many Lessons of Warning, took their Rise from the Disunion of the Nobles, whose private Attachments led them to follow different Standards, while the Expectation of the People, being equal from both Parties, inclined them to wish for Repose under some one Family, rather than the Victory of either. But where the Experience, as well as the Expectation, is unequal, where the Genius of a Family has been for Generations repugnant to that of the People, where this natural Repugnance has been heightened by the Policy of arbitrary Courts, the Servility of foreign Nations, the Protection of determined Enemies; by the basest Maxims of Superstition, dispensing with the Obligations, or eluding the Sanctions of true Religion; who cannot but ap-

plaud such Means of giving Vigour to the Law, that it may prove a Defence proportioned to the Greatness of our Enjoyments? We have a Religion to lose, founded on Principles of Purity, of Freedom, and Mercy: We have a Constitution of Government, the best formed to convey Peace and Happiness to Mankind: We have Honour to lose, of which the Monuments of former Ages shew, that as large a Patrimony as any Country can boast is descended from our Ancestors. These are Considerations, which cannot but affect good Men to the Heart: They especially concern such as are called to the public Service in Parliament. A brave Soldier would be covered with Confusion, to desert the Post assigned him by his General in a Day of Battle: so every one of these is equally incapable to desert that Station, in which the Choice of the Crown or the People has placed him, a Guardian of the public Liberty. And as he would appear in the Field, if the Necessity of the Times required it, against Traitors, who should invade these invaluable Rights, he is animated by the same Zeal, to lend his Voice and his Power to arm the Law with that Terror, which may prevent the dangerous Necessity.

—Nova

—————*Nova Bella moventes*

Ad Pœnam pulchra pro Libertate vocabit.

VIRG.

Let it be remembered further, that this Zeal for Liberty, which opposes itself to the Lovers of Tyranny or Licentiousness, inspires a due Regard to the rational Assertors of it. And have not the Defenders of Revolution Principles, and the Protestant Succession, a just Claim to so important a Security against any, who, in a future Time, shall attempt to eradicate and destroy either?

But these Considerations should particularly weigh with us*, when a Foreign Power has made a strong, tho' vain, Effort, even previous to a Declaration of War, in Contempt of the most sacred Leagues, to shake the firm Allegiance of the Subject, to alter the Government of this Kingdom, and to gratify a shameless Perfidy, and a ruinous Ambition. If the Fleets and Armies of that Power are sent out with a Pretence of sup-

* This Discourse was written a few Months after the Alarm of a designed Invasion from *France* in 1743.

porting Allies and Friends, it means only to extend and aggrandize itself. Examples of other Countries too clearly shew, that they, who court and rely upon this Friendship, nourish a Strength, which will prove one Day their Destruction. Vainly they flatter themselves to confine the Consequences to their Enemies. When once the Torrent passes its proper Bounds, those, who have given it Vent, are the first to be born away in the Rapidity of its Course. The Glories of the *French* Monarchy have never been built upon the Justice or Moderation of its Princes; and, when they have given Assistance to a Neighbour Nation with generous Professions, their Design has uniformly been to subvert the natural Manners and Independence of that Nation. The People of *England* have expressed their Sense of this Truth: the Parliament have seconded their Indignation by a salutary Law. In the mean time it is not to be doubted, that the Attempts of Enemies, who hate our good Faith, and envy the Sources of our Strength, may raise a Spirit of Watchfulness both in the Prince and People: and as, on the one hand, they will engage the Royal Family on the Throne to think their Security depends on a Lenity,

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Wisdom,

Wisdom, Integrity of Government ; so, on the other, they will engage the Nation to a Temper of Calmness and Loyalty, and induce every private Man to reflect, that the Love of our Country comprehends and ennobles all the private Relations and Partialities of Life; and whatever tends most effectually to perpetuate the Laws of it, tends, at the same time, to perpetuate his own Name, Wealth, Honours, and Posterity.

A P P E N D I X.

Octob. 15, 1745.

THE Writer of the foregoing Essay, in considering the Argument of it, both as a general Question of Law, and with a particular View to the Law of *England*, has made it his Endeavour to obviate every Objection, which either the Observation of others or his own Reason and Invention could suggest to him. Yet he is sensible, that one Difficulty remains unsatisfied, which may not be improperly introduced from a Passage in the Book itself; where it is said *, “ That our
 “ Law varies from the Feudal Policy, to
 “ which it owes its Origin; because, by
 “ the former, all forfeitable Lands are alien-
 “ able at the Pleasure of the Party in other

* P. 85.

“ Ways

“ Ways than by Forfeiture ; whereas, in the
“ latter, they were forfeited, tho’ not alien-
“ able or chargeable in any way by the sole
“ Will and Power of the Tenant, and
“ merely descendible to his next Heir upon
“ his Death.” Now it may be added, “ If
“ this Peculiarity be an Advantage, which
“ the Law of *England* has over the Feudal
“ Law, it may be complained of also, as
“ an Advantage, which it maintains un-
“ duly over the Law of *Scotland* : and the
“ rather, after Provision had been made at
“ the Revolution to remedy the Inconsist-
“ ency, and limit the Forfeiture of Inherit-
“ ances within its just Bounds. In our Law,
“ the Tenant in Tail can aliene by Consent,
“ and upon that Reason was made subject
“ to Forfeiture by Crime. In that of *Scot-*
“ *land*, the Tenant, under a strict Tailzie,
“ cannot aliene, and yet is subject to For-
“ feiture. By the Act of the Seventh of
“ Queen *Anne*, the Right of the Crown to
“ such Forfeiture, which had been released
“ in 1690, was again revived, to last till
“ the Pretender’s Death, and then was to
“ be extinguished for ever. To suspend the
“ Expectation of that Blessing longer, by
“ enacting the Forfeiture to continue till
“ after

“ after the Death of his Sons, is manifestly
“ unjust, and contrary to the Terms on
“ which it was suspended at that Time.”

In this Essay it has been laboured, with great Care, to shew, on what a Variety of just, social, and comprehensive Principles, both the Creation and Forfeiture of Inheritances stand. And therefore, tho' it be true, that the Reason of forfeiting Estates Tail in *England* is said to be derived from the Tenant's Power to aliene; yet it should be considered, that this Reason is only one, and that perhaps the least weighty, selected from many others, which support it. The main Principle in which all the Points of this Argument centre, is this, that every Right conferred by Civil Law, is justly limited by that Law, according to the Genius, Consent, and Policy, of different States. So that if the lesser Principle, which may perhaps be thought to come closer to the strict natural Justice of the Case, cannot be applied, by reason of general Convenience, the greater is at hand, which comprehends and decides it. In the Argument of a famous * Case in the

* *Hob. Rep.* 334. *Sheffield v. Radcliffe.*

Exchequer-Chamber, it was intimated by one the best Lawyers of any Age, Lord *Hobart*, that it was not a necessary or foreseen Construction of the Statute *de Donis*, to exempt these Estates Tail, described in it, from Forfeiture; since even after the Statute, they were, in Effect, the same as Fee-simples Conditional, which, on Issue had, were before liable to be affected by the Treason of the Tenant. It was therefore plainly his Opinion, that the Forfeiture of them might be vindicated from other general Reasons of Justice and Civil Prudence. One cannot, however, help acknowledging, that the equitable and admired Maxim, "No Estate ought to be forfeited by Crime, which cannot be alienated by Consent," seeming to be received in *England*, furnishes an Evidence of the Exactness, with which our Law holds the Scales in the Business of Forfeiture; and how studiously it preserves the Grace of System and Analogy. But it must at the same time be acknowledged, that this Maxim receives its Weight from being grounded on another Maxim; that "No Estate ought to be restrained from a complete Power of Alienation by Consent." And in whatever Law this last Maxim is received,

ceived, the first will be observed of course. Therefore if one attends to the Law of *Scotland*, it will probably appear, that the Want of adhering to the first Maxim, so far as Cases of Forfeiture subsist, which cannot be reconciled with it, is owing to the Neglect of the other Maxim, without which the first may produce the greatest Danger and Inconvenience.

To treat the Subject with Clearness and Brevity, it will be material to set forth,

I. The general Nature of Estates-Tailzie, and the History of exempting those of the strictest Kind, from Forfeiture for Treason.

II. How far that Forfeiture was revived by the Operation of the general enacting Words in the Statute 7 *Annæ*, c. 21. That, “from and after the first Day of *July* “1709, all Persons convicted or attainted “of High Treason, or Misprision of High “Treason, in *Scotland*, shall be subject “and liable to the same Corruption of “Blood, Pains, Penalties, and Forfeitures, “as Persons convicted or attainted, &c. in “*England*.”

I. As

I. As to the Origin and Nature of Estates-Tail in *Scotland*, it is said, by the Authors, who have written upon them, that they are derived from *England*, and in the Nature of Substitutions, or *Fidei commissa*, in the Civil Law, and *Feuda Gentilitia*, in the Feudal Law. The celebrated *Craig* speaks of them as receiving a strict Interpretation, being injurious to the Course of Feudal Descents, the ancient Fruits of Tenure, and Rights of the Crown. The first Design of them was to perpetuate Estates in the Male Line, excluding the Heirs General, by which the Lords and King lost the Wardship and Marriage of Females. But they were subject to Forfeiture; and Members of the Entail were apt to create Charges, and even alienate without a Remedy provided for the next Substitute or Heir of Tailzie. To prevent such Charges and Alienations, prohibitive Clauses (conceived in general Words, and without any Penalty annexed) were added to Entails; and yet they were for a long Time so intirely new to the Genius and Principles of the Municipal Law of *Scotland*, that * *Craig* (who wrote in the Year 1600)

* V. *De Feudis*, c. 16. l. 2. de Tallia.

takes no Notice of any other Restraint on Alienation, than the old Feudal one of asking the Superior's Consent: And it might well admit of some Doubt, whether those Clauses would be allowed as legal, and whether any or what Relief could be given to the Heir in virtue of them. In respect of Creditors for a valuable Consideration, the 18th Act passed in the Parliament of 1621, against the fraudulent Dispositions of Bankrupts, had rendered them of no Avail; and, by Consequence, had placed them in an unfavourable Light. The Judges however, at last, made some Efforts towards relieving the Heir; and, by Construction of that very Act, considered him as a Creditor under the prohibitive Clause of the Settlement, but only against the voluntary and gratuitous Deeds of his Predecessor: The Land was still liable to Contracts of lawful Debt, agreeably to the positive Words of that Act, which had been thus constructively taken to the Heir's Benefit. When the Judges had proceeded so far in Support of these Settlements, it is easy to imagine, that the Makers of them would contrive Means of extending that Support much farther, and of obtaining, by the express Provision of the Party, what

what the mere Operation of Law could not effectuate. To this Intent, the Clauses irri-
tant and resolute were inserted ; one, to
make void all Charges and Executions on
the Land, that the Creditor might receive no
Benefit from his Contract ; the other, to ex-
tinguish the Right and Title of that Member
of the Entail (who should subject the Land
to Debt), and of all, who claim under him.
Thus the Conditions of the Settlement were
enforced at the Peril of the several Interests
of those, who should be concerned in break-
ing them.

Lord *Stair* * (who was President of the
Session soon after the Restoration), in his In-
stitutes of the Law of *Scotland*, intimates,
that such Clauses did not become very ordi-
nary earlier than his own Time ; and gives
it as his Opinion, that “ they do not well
“ quadrate with the Right of Property ;”
for which Cause, he says (speaking of the
State of them, when he writes), “ they are
“ seldom put upon Heirs of Line, Heirs
“ Male, or Heirs of Provision, by Contracts
“ of Marriage, as being Heirs of Blood.”

* *Stair's Inst.* 1 B. Tit. 14. 4 B. Tit. 18.

He observes *, that “ in *England* these
“ Estates were made void by a dissembled
“ Proceeding of Fine and Recovery ; and
“ by Warrants to sell, purchased in Parlia-
“ ment, which pass without much Diffi-
“ culty. If they become frequent with us,
“ it is likely we shall find the same Re-
“ medy.” And he adds, “ Albeit Clauses
“ irritant in Tailzies be not penal, yet be-
“ cause they are against the Common Law,
“ and therefore odious, they should not take
“ Effect, before they be declared in a judi-
“ cial Course.” To the Reasons here laid
down, it must be owing that these Clauses
are not expounded the most liberally in Sup-
port of the Design of the Maker : For if one
of them is by Negligence omitted in a Set-
tlement, and one stands alone, tho’ the Maker
intended both ; yet they are never supposed,
when they come in Judgment, to imply one
another. A Clause irritant will annul Debts
contracted, but not the Right, which the
Debtor has to the Land ; in which Case, the
Creditor is the only Sufferer : and a Clause
resolutive will make void the Right of the
Debtor, but not the Debts contracted ; in

* *Inst.* 2 B. Tit. 3.

which

which Case, the Debtor is the only Sufferer. After some Experience, these Clauses were found to tend greatly to the Injury of Creditors, and the good Faith of Commerce, so as to evade the plain Meaning of the Act of 1621, as well as inconsistent with the Nature of Property and Dominion. Such Inconveniencies were more especially apprehended upon the Determination of the remarkable Case of Lord *Stormont* in 1662, in which irritable and resolute Clauses were adjudged effectual in respect of all Creditors whatever. Another Act of Parliament, therefore, was thought necessary, to restrain their Operation, and to secure Creditors and Purchasers, who contracted *bonâ fide*, and without Notice; that is, were not aware of the Limitations and Conditions annexed to the Estate. This was done in the Year 1685, by a declaratory * Law concerning them. In the same Act, Occasion was taken, for the first Time, to give a Parliamentary Sanction to the Tailzies so limited. But during all this Time, however the ordinary Rights of Alienation might be restrained, or taken away, the Right of the Crown to the For-

* V. Act 22. 1685. Scotch Acts of Parl. V. III. p. 35.

feiture of these Tailzies upon Offences, which legally incurred it, was never called in question; and that Law reserves and declares it, by exprefs Words.

At the Revolution, the Forfeiture in Prejudice, not only of Creditors and Vassals, but of Heirs of Entail, was declared to be a great Grievance, by the Convention of Estates in *Scotland*. Nor was the Argument, which now seemed to be drawn for defeating this Penalty, or Alienation by Forfeiture, in Treason, from the Effect of the restrictive Clauses in Tailzies, to defeat the ordinary Kinds of Alienation, any Reason or Argument for declaring it so. For surely it could never be thought right, or consistent in Reason (if some strange Abuses of the Power of inflicting this Penalty, recent at that Time, had not demanded it), to add by Act of Parliament (as was done in 1690), a new and more extended Operation to those Clauses, not warranted by the Rules of construing them, or the antient Policy of the Kingdom, merely to save Tailzies from Forfeiture; when the Parliament had been so jealous of them five Years before, as to restrain them, for the Sake of public Policy, in respect of
Creditors

Creditors and Commerce, even against their natural and judicially allowed Operation. The Truth is, that the History of the Times, and the Claim of Rights made by that Kingdom, will unfold the sole Cause, why the Forfeiture, at least in respect of the Heir, was considered as a Grievance. * Confiscations were promised before Conviction or Process; Persons imprisoned without a Reason given; forced to depose against themselves in Capital Crimes; pursued and forfeited upon Stretches of obsolete Laws, frivolous Pretences, and defective Proofs. Judges were influenced by Commands contrary to Law, and turned out of their Offices for Disobedience, inconsistently with ancient Usage, and their necessary Independence: Opinions given by the Lords of Session, that to conceal the asking of Relief for one forfeited, and the refusing to discover private Judgments in relation to other Mens Actions, are Points of Treason. It is not to be wondered, when the Crime was to such an high Degree precarious, the Method of proceeding so arbitrary and unjust, the Examples of those, who suffered,

* *Acts of Sc. Parl.* Vol. III. p. 147—155. See the *Declaration of Est. containing the Claim of Rights, &c.*—*The Articles of Grievance represented, &c.*

recent and numerous, that a Punishment, which is the Terror and severest Scourge of bad Men, should become formidable, as well as odious, to good Men. The Attainder of the Earl of *Argyle* in 1685, is particularly taken Notice of in the Claim of Rights, as a Reproach to the Justice of the Nation. One Clause in it, declaring him, and those who had joined with him, incapable of Mercy, and such as should interpose for their Restoration, guilty of Treason, was so much beyond the Example of former Times, that it was repealed in the following Year, by the very Parliament, which attainted him. In 1689, as soon as the Convention of Estates had been declared a Parliament, and the new Government was established, his Attainder was entirely reversed; and the Preamble to the Act of Reversal recites that Part of the Claim of Rights which was applicable to the Proceedings in his Case. The Reversal of *Andrew Fletcher* of *Saltoun*'s Attainder, and the Reversal of Sir *Patrick Hume*'s Attainder, in 1690, recite the same in the strongest Terms; and add, that all such Forfeitures are to be considered, and the injured Parties redressed. The former had been condemned on the Deposition of a
single

single Witness, under the Terror of Death, and Temptation of Pardon, as standing charged with, and Prisoner for, the alledged Crimes. This is a general View of the Facts, upon which the Declaration in the Claim of Right was founded. And that such Oppression might be prevented for the future, *in these two Sessions of Parliament, two different Acts were made in favour of Vassals, Creditors, and Heirs of Entail, of Persons forfeited. By the latter of those Laws (the Act of 1690), the Right of the Crown to the Confiscation of Estates-Tail was limited; and, in a great Measure, released; and “ the
“ Heir prejudged, only in so far, as the
“ Party forfeiting had Right to contract
“ Debt, or affect the Land, or others, by
“ Quality of the Right and Infeoffment,
“ and had not exercised his Right.”

Now it will not be improper to observe, that the Preamble to the Act of 1690, which releases the Royal Right, instead of grounding itself on the Facts just mentioned, seems to carry the Thing too far, and to proceed upon Reasons of another Kind than were

* *Act* 33. 1689. *Act* 33. 1690.

expressed two Years before, in the Claim of Rights ; or even that very Year, in the Reversal of the Earl of *Argyle's*, *Andrew Fletcher's*, and Sir *Patrick Hume's* Attainders. No Principle is more just and amiable, than what is laid down in that Preamble, that "every Man should suffer for his own Crime:" yet how to prevent (agreeably to what is said immediately after) "the Innocent from being involved," in a great Measure, and under some Circumstances, "with the guilty," is a very hard Problem in Politics, and human Life : for, in many Cases, the Nature of Things inseparably blends their Interest. And in all, where they are blended by Policy of Law and Civil Society, Natural Equity interposes less in favour of the Heir, than of any other. Let that Equity be applied to Creditors and Vassals, Persons who have paid a valuable Consideration for their Interest, it not only ought to be maintained to the utmost, but is in no sort impeached by the Law made, subsequent to the Union. But it carries not equal Weight, when applied to Heirs of Entail, whose Interest was gratuitously conferred ; is subject, in many Cases, to be extinguished or diminished by voluntary Alienations, or
Charges

Charges of the immediate Possessor; and, receiving its Allowance from the Law, as well as its Existence from the Maker of the Tailzie, may, in all Cases, reasonably stand subject to be rescinded by Contraventions of Law, as well as of the Settlement. Another Thing laid down in the Preamble, as a Ground of that Act, is, the Principle already mentioned, “that nothing ought to be forfeited by Crime, which cannot be alienated by Consent.” And this is not so much a new and different Principle, as a Branch of the former, or a Conclusion deduced from it. It is in itself, and taken absolutely, a rational and just Conclusion; but when made the Measure of judging on this Question, as it concerns the strict Tailzies, may be fairly shewn to be attended with Danger; and, if pursued to its Extent, instead of placing the two Parts of this united Country upon equal Ground, will confer a Kind of Privilege, or Exemption, upon one, for the Benefit of neither. This will be considered more properly under the Second Head of Argument, when the Revival of the Common Law of *Scotland*, as to these Tailzies, shall be vindicated. Let it suffice to say here, that, upon the Whole,

this Preamble scarce appears to have been framed and considered, as the Prefaces to Laws ought to be: it aims to draw Arguments for releasing the Right of Forfeiture from vague, indistinct, and general Maxims; and not from that particular Experience, which should be the Inducement to every Law, and which was the only Cause of declaring that Right a Grievance. Besides, the true Remedy for the Grievance did not lie in advising the Crown to release the Right of Forfeiture, but in taking away that Description of the Crime of Treason, and those Methods of proceeding, which had been made the Instruments of applying it to Purposes of Oppression. And this may be said under the Sanction of great Authority, since the Parliament of *Great Britain* seemed to consider the Matter in this Light, when, without listening to the general Maxims of Reason cited from the Preamble of the Act of 1690, they applied themselves to alter the Crime and Process of Treason in *Scotland*; to regulate the Administration of Justice in State-Crimes, upon Principles much safer for the Subject, than were known there before; and so thought, that all probable Danger of
reviving

reviving the Grievance was removed by that very Statute, which restored the Right.

II. The next Question is, How far the general Words of the Act for improving the Union, passed 7 *Annæ*, operate, to revive this Kind of Forfeiture? the Consideration of which will present to View,

1. In what Cases Estates-Tailzie are saved from Forfeiture, notwithstanding the general Words.

2. What Cases of Forfeiture, arising from such Estates, coincide with the Principle of confiscating, by Crime, that Property, which may be alienated by Consent; and, not having been taken away by the Act of 1690, subsist still by the Common Law of *Scotland*, without receiving any Operation from the same general Words.

3. What Cases of Tailzies are laid open by those Words, to Forfeiture; and do not coincide with, nor are governed by, that Principle.

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3. What Cases of Tailzies are laid open by those Words, to Forfeiture; and do not coincide with, nor are governed by, that Principle.

1. Every

1. Every Case, which the Law of *England* favours, and exempts from Forfeiture, is saved in the Law of *Scotland*. Tailzies, made in Consideration of Marriage, or upon any other Consideration, are not affected by the Forfeiture of a Traitor, who is expressly described in them as only Tenant for Life, and has none of the Powers incident to the Property of the Fee; several of which the Tenants in Tail still enjoy, so as to make their Estates considered justly in Law, as Estates of Inheritance, tho' they are tied up in many Points, by the strict Clauses, in their respective Settlement. Again, where there are any Substitutions or Remainders in a Settlement, these are not affected by the Forfeiture of the Tenant in Tail in Possession, agreeably to the Proviso in the Statute 33 *Hen.* 8. and it has been usual for the Grantee of the Forfeiture, to purchase out the Interest of the Substitutes or Remainder-men; tho', by many particular Acts of Parliament passed upon extraordinary Occasions, a Day has been given to them, against which they were to come in, and make their Claim; otherwise their Right and Interest were to be totally extinguished.

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In this Instance, by making the Law of *England* the Rule of Forfeiture in *Scotland*, the Effect of the Act of 1690, is still preserved to the Substitutes or Remainder-men: for at the Common Law, before that Act, the Forfeiture of the Tenant in Possession was the Destruction of the whole Settlement. Lastly, where any Man was seized of an Estate-Tailzie, affected with prohibitive, irritant, and resolute Clauses, and was married before the Act of the Seventh of Queen *Anne* took place, Issue being had, or Possibility of Issue remaining, he was secured in like Manner. This Case was considered in a particular Proviso of the Act, out of Tenderness to such, as had actually contracted in Marriage at that Time, in Confidence, that Settlements so established would, in respect of the Issue of the Marriage, be exempt from Forfeiture, tho' not intended to be favoured, in respect of any, who, being seized under these strict Settlements, should marry, after Warning given by Parliament, that the Condition of Forfeiture was annexed to them, for the future, by Construction of Law.

2. As

2. As to the Cafes, which subfift by the Common Law of *Scotland* (without having been varied at any time by Statutes), and coincide with the Principle fo often mentioned, they may be ftated in this Manner. Where the Maker of a Tailzie, upon onerous Caufes, or a valuable Confideration, referves an exprefs Power to alter or innovate during his Life, by Acts, which he does not fpecify to be perfonally exercifed by himfelf, and afterwards commits Treafon, he may be conftrued to forfeit. This is agreeable to Determinations in *England**, that where the Condition of Revocation in a Settlement, either in refpect of Tender or Deed, is not fo perfonal, but that another may perform it, there the Crown may exercife the Power of revoking, upon a legal Forfeiture. Where the Maker of a Tailzie, not depending on any onerous preceding Caufe, is inclined to revoke it, tho' he has not exprefly referved a Power for that Purpofe; yet it is implied in the Settlement, as being *donatio mortis caufâ*, and in the Nature of a Testament, which, till the Death of the Party, is am-

* *Hale's H. Pl. C.* Vol. I. p. 246.

bulatory, and a revocable Act. Here, likewise, the Principle does not interpose to prevent the Forfeiture. Where Tailies carry a simple Destination of Succession, they may be exposed to Forfeiture, consistently with this Principle; because those Settlements provide only a particular Line of Succession, varying from the legal one; and leave a Power to the Maker, or respective Members, as they succeed, to alter them. Where Tailies are created with prohibitive Clauses, or *pacta de non alienando*, there can be no Ground of Complaint, if they are exposed in like Manner. For those Clauses operate no further, than to prevent voluntary and gratuitous Dispositions of the Land: It is nevertheless subject to the Possessor's Debts, and may be disposed of for a valuable Consideration. Where Tailies are made in the strictest Manner, if a Power of raising a Sum of Money, or affecting the Land, by Debt, to a particular Value, be reserved to the Member of the Settlement in Possession, the Heir may be prejudiced by the Forfeiture of the Possessor, so far as that Power extends, agreeably to the Operation of the Principle, and within the Intention of the Act of 1690.

3. It

3. It must now be acknowledged, that there is a Case taken away by the Act of 1690, and revived by the Statute of the 7th of the Queen, which can hardly be reconciled with this Principle; in which an Heir of Tailzie, taking Right of Succession by a Settlement, having in it Clauses irritant and resolute, as well as prohibitive, may forfeit on the Commission of Treason, not only for himself, but for the Heirs of his Body; tho' the Law has not given him a legal Method of Conveyance, by which he can bar the Right belonging to his own Issue, under the Settlement. But tho' the Law has not expressly provided such a Method, yet it has left one open, in consequence of the Act of 1685, concerning Tailzies. By that Act, if the Provisions and Clauses, irritant and resolute, are not repeated in the Return of the Inquest, and in all the Instruments of Seisin and Conveyances (which are necessary in *Scotland*, to put the Heirs of Tailzie in Possession), the Omission shall import a Contravention against the Person, who omitted to insert them, but not against Creditors *bona fide*: and thus an Heir, who resolves to break the Tailzie, may take Advantage to sell, from
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the Omission of these Clauses; in which Case he will get his Price, the Buyer be secure, and the next Heir of Tailzie be defeated. Had this been foreseen, when that Law was made, it would have been prevented: but, whilst the Possibility of it subsists, it softens the Hardship, and affords, in some Degree, a Plea for the Forfeiture, even upon the Principle of Alienation by Consent. For the Law, being a Stranger to those refined Notions of Honour, which distract some Minds, will not presume, that he would scorn to alienate the Estate of his Family by Fraud, who exposes it to Forfeiture for Treason committed in Violation of his Allegiance, and solemn Oaths.

Admitting, however, that this Case does not pursue the Principle insisted on, it shall now be argued (with all Respect to the Memory of that Parliament, who framed the Act of 1690), that the Case ought not to pursue it. For it leads to Consequences widely different, in the Laws of *England* and *Scotland*; and tho', when applied to both, it sounds the same Thing in Words, it is by no means the same in Reality. In order to prove this, it will be important, to
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state the general Notions of Law in the two Countries, as to the Power allowed over Inheritances. The antient Feudal Policy was very strict upon this Subject, and gave the Tenant in Fee no other Privileges, than such as arose from his Possession of the immediate Profits and Improvements of the Estate. The Course of Succession was uniform; and every Man, who claimed under a Feudal Gift made to one and his Heirs, was to derive his Descent from the Blood of the first Feudatory, or Purchaser. So that when once the Gift had been made by the King, or Lord, the Law seemed to take the future primary Direction of it into its own Hands. By Degrees, the Strictness of this Policy wore out in *England*, and the Law, in a Course of Ages, has adopted new Principles, and allowed such a Latitude of Alienation to the Tenant in Fee, that at present it seems only to act a Secondary Part, either to come in Aid of his Intention, when he has declared it, or to supply the Defect of not declaring it, by general Rules of Descent and Distribution, which take place in Failure of a Disposition made by himself. It is upon these Principles, that several Methods of Conveyance have been established, by which
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the Course of Succession may be new-moulded ; that Statutes have been made, at different Times, enabling to alienate, to charge Lands with Debt, and to devise them by Testament. Hence the Court of Chancery has gradually extended a superior Relief, or Equity, to the Devisee, or *Hæres factus*, in preference to the Heir at Law, or *Hæres natus*. And it is out of regard to these Principles and Statutes, that he, who disposes, is restrained only from doing it in such a Manner, as to take away, from all others, that Power of Alienation, which the Law permits to himself. In *Scotland*, the same, or similar Powers, have been admitted in a Tract of Time: For, tho' the Consent of the Superior be necessary, yet, on Adjudication had, the Superior may be forced to admit the Person infeoffed by the Vassal: And tho' there be no Testamentary Powers allowed in their Law, yet Settlements *Mortis causa* are frequent ; the general Course of legal Descent is interrupted ; and the Powers over the Estate limited and modelled, often, indeed, much stricter, in respect of him who is to take it, than they are in *England*, yet much more according to the Maker's Fancy. But how much soever the Intention of the Maker of

a Settlement may be favoured in both Countries, so as that the Law has been brought to say, in Prejudice to itself, *Modus & Conventio vincunt Legem*, still the Law governs and restrains, in Matters, which concern the Common Policy, nor suffers that Intention to defeat the Ends of it. The Intention is favoured, where it may, consistently with those Ends; and, in different Countries, the Regard shewn to it will differ, and be either restrained or extended, according to the varying Reasonings of various Systems of Law, and Decisions of Courts of Judicature. Yet let the Regard shewn to it in *Scotland* be as great as possible (which shall now, for Argument-sake, be allowed to stand upon the best Foundation), certainly it would be a dangerous Consequence, in Reason of Law, because the Intention of the Party is so far favoured, as that Settlements in Tail may be made much stricter in that Country, than they are in *England*, that therefore the Forfeiture of Estates-Tail should be proportionably restrained: Since, in Process of Time, as those Settlements prevailed, the Policy of the Law of Forfeiture would be intirely evaded (a Case which can never happen in *England*,

England, as will be shewn hereafter, when the Distinction shall be accurately stated between the two Kinds of Settlement). It is plain, in point of Fact, that this Consequence was not admitted in the old Feudal Law, by which, notwithstanding the strict Regard had to the Intention of the Donor, and in consequence of it, the Tenant's Inability to aliene from his Heirs, the Land was forfeited to the Lord in many Instances. It was plainly not admitted in *Scotland* at the Time of the Resolution in Lord *Stormont's* Case; for otherwise the Lords of Session would have declared the Estate-Tail exempted from Forfeiture, when they declared the Tenant restrained from Alienation by Grant or Sale. It was plainly not admitted by the *Scotch* Parliament, at the Time of making the Declaratory Act of 1685, in Support of Estates-Tail, when this Right of the Crown was reserved in the most ample Manner. It was plainly not thought of in 1688, by the Convention of Estates at the Revolution, who, in declaring the Forfeiture a Grievance, proceeded upon the unjust and extraordinary Application of it, in the Course of the preceding Reign, without giving the least In-

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timation,

timation, that, of itself, it was inconsistent with Natural Justice, or the Reason of the Common Law. If, therefore, it be shewn, That the Consequence would be dangerous, in point of Reason, and, till the Year 1690, was not, in Fact, admitted by the Parliament; we may conclude, till then, that the Fact was grounded upon the Reason; and the Legislatore of *Scotland* thought, that tho' the Principle of making Alienation by Crime, and by Consent, run *pari passu*, might, in general, be just; yet, if it were, indulged to its full Extent, in their Country, it might endanger the Subversion of all Justice.

That the Argument may be carried further, let *Craig's* Observation be resumed, That the Creation of these Estates-Tail was injurious to the ancient Course of Descents, and to the Rights of Wardship, and Marriage of Females, so beneficial to the King and Lords. Let it be supposed, when the King originally gave way to the Creation of them, that he addressed himself to the first Makers of them, in this Manner: " Since you think
" these Settlements will tend to preserve and
" perpe-

“ perpetuate the Wealth and Dignity of your
“ Families, I am ready to consent, tho’ in
“ consequence it will deprive me of Rights,
“ which have been esteemed the fairest
“ Flowers of the Prerogative. But some
“ of these, being merely private and personal
“ Advantages to myself, shall not be placed
“ in Competition with the Desires of my
“ People. One Right belongs to the Crown,
“ that of Forfeiture for Treason, in its Na-
“ ture and Effects of too much Concern-
“ ment to yourselves and the Kingdom, as
“ the great Sanction of Law, and Cement
“ of Society, to be surrendered by me.
“ Establish these Tailzies as strongly as you
“ may: Try all the Precautions, which ei-
“ ther the Wisdom of the Common Law,
“ or the Parliament, will allow, to protect
“ your Settlements from those, who, by
“ the ordinary Methods of alienating, shall
“ endeavour to contravene them. But let it
“ be understood for ever by you, and your
“ Heirs, that you may take care to culti-
“ vate the best Inclinations, both in your-
“ selves and others, when the fundamental
“ Policy of the Law itself is contravened
“ by any of you, that Public Settlement,
“ from

“ from which Government derives Peace
“ and good Order, every Individual the
“ safe and regular Enjoyment of his Pro-
“ perty, I will reserve my superior Right,
“ agreeably to your antient Customs, and
“ the Constitution of the Realm.”

It is true, that the *Scotch* Nation, and its great Deliverer at the Revolution, reasoned in another Manner, not looking forward with enlarged Views to future contingent Dangers from the abdicated Family, but attentive only to that dark Scene, which had been just closed with such wonderful Circumstances of Felicity in both Kingdoms. When the Union was completed, a very formidable Invasion was attempted from *France*, which turned the Minds of Men upon this Subject. They saw the Work of much Time, Industry, and Wisdom, in Danger of being utterly destroyed, at the very Instant it was finished ; and, as soon as the Danger was removed, thought it no longer fitting, that *Scotland* should want that legal Sanction, which is a main Pillar of the *English* Monarchy. They saw a Necessity, whilst Pretensions to the Crown subsisted
(especially

(especially when the Treaty of Union had been formed on Principles essentially contrary to those Pretensions), that not only the People, but the Law, as an Expression of the Sense of the People, should oppose the Terror of its severest Punishments against any, who might dare to support them. The wisest among us had long wished, that the same System of Laws, and private Rights, as well as the same Administration of Government, should prevail over this Island; and knew that the Reformation of whatever relates to Treason, that is, to the public Policy of the Kingdom, contributed in a great Degree to that End. When the Crime and Proceedings had been made uniform in both Countries, the Forfeiture came to be considered. That of entailed Inheritances was attended with Difficulties; the Cases saved from it, and those which are liable to it, consistently with the Principle so much insisted on, have been already stated. Some Arguments have likewise been offered to mitigate, if not justify, the seeming Rigor of that Case, which it is said can hardly be reconciled with this Principle: And perhaps a Lawyer and Statesman, reasoning upon it

with the Prejudices of the Law, and Constitution of *England*, about him, might pursue his Argument still farther. He would recollect in what manner Attempts to add irritant and resolute Clauses to Gifts in Tail, have been treated in *Westminster Hall*. Even before the solemn Judgment in *Edward* the Fourth's Reign, that a Tenant in Tail by Common Recovery might bar not only his own Issue, but all Remainders and Reversions expectant upon his Estate, the Law was held to be against them, notwithstanding the Expression in the Stat. *Westm. 2. de Donis*, "That the Will of the Donor be observed." Two Judges, as long ago as in the Time of *Richard II.* and *Henry IV.* caused Settlements of their Land to be made with such Clauses inserted; but *Littleton* and *Coke*, and all the Courts, have said, in Judgment, that they are not to be allowed, as full of Imperfection and Danger, and offending against many Rules and Reasons of the Common Law. He would then observe the Difference between the strict Entails of the two Countries. The strictest Settlement which can be made in *England*, may be overturned, as soon as made, by the joint

joint Act of those who have the immediate Possession and Seisin, and the Heir in Tail next described in it ; whose Estate, when it comes at any Time into Possession, enables him to aliene or forfeit the Whole by his single Act. In *Scotland*, there is no such Power lodged in any one or more Members of the Tailzie, either by the Terms of the Settlement, or the Construction of Law upon it. So that the Entails of that Country are, in a Word, complete Perpetuities. As a Lawyer, he would recite, with what Applause the Methods taken both by the Parliament and Judges, to rescind or evade the Statute *de Donis*, have been received in all Times ; with what Indignation Attempts to revive the Force of it have been rejected : And he would enumerate the old Sayings, grave Sentences, and wise Decisions, against Perpetuities, with which the copious Writers of the Law furnish him. As a Statesman, he would reflect on the many Inconveniencies arising from them to the Crown, the Public, to Families themselves : their Repugnancy to the fluctuating Genius of Property and Commerce, to the fundamental Maxims of infant or flourishing States. And
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he would draw this Conclusion from the Whole; That as far as *England* and *Scotland* agree in the Principle of creating or alienating Estates of Inheritance, so far they stand upon equal Terms as to the Forfeiture; but for all beyond, he must think it somewhat strange, first to ground Estates upon Principles contradicting the general Policy of Law, and then to complain, that they are not favoured in every Instance to which those Principles will lead us.

But, not to insist upon Reasonings, which may seem derived from Prejudice, this is certain, that the *Scotch* Nation in general has been a Gainer by the new Law. Try it by the Rule laid down in the 18th Article of Union, either as a Matter of public Government, or private Right (for it is a mixt Question of both), it is evidently for the greater Utility of the Subjects within that Country. The Certainty, the Justice, the Lenity of the Law of *England*, in short, every Security against the Abuse of Forfeiture, which was known to one Half of the People, is extended to the other in its full Strength. As therefore that System of
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the Law of Treason, from which Confiscations received all their Bitterness, was abolished by the Act for improving the Union; and both then, and since unhappy Commotions, dangerous to the Liberty of each Kingdom, have arisen in *North Britain*, those who in some Degree restored the Forfeiture of the Estates-Tail described in that Act (which had been taken away but a few Years), proceeded on the very Principles, which animated those who declared it a Grievance. It would be dishonourable to suppose, that the same Wisdom of that Nation, which adopted the Revolution, the Union, and Protestant Succession, would not intirely have approved it, when the general Benefits of the Alteration were attended to, and the particular Necessity of strengthening this mighty Fabric, formed and cemented of such inestimable Materials, against the Incendiaries of Faction, and the restless Tools of Slavery.

But whatever the Situation of Affairs might be in any former Time, surely it is modest to affirm, that every Argument which could be used for the Continuance or

Vindication of the Law in question, strikes with redoubled Force in this unexampled Crisis of Foreign and Domestic Dangers. Every Topic, which can be laboured to clear Difficulties, and sooth Men's Thoughts, appears to generous Minds in the most amiable Light. What one Pretender would have unsettled, both when the Union and Succession took place, another, in his Father's Name, with that Boldness, which Despair, and not Hope, suggests, is attempting to subvert. Have then these Descendants of King *James* a Right to complain, that the Punishment of an Ancestor is extended to their Detriment, who now stand excluded for their own Fault, in presumptuously and seditiously affronting the unbiassed Sense of Parliaments for more than Half a Century, and traiterously setting up a Title to the Crown, contrary to the Duty of that Allegiance, which the Pretender owes as an *English* Subject, inconsistent with the solemn Oaths of the People, and repugnant to the legal Maxims of a free Constitution? Shall that Family, who have thrown a Disgrace upon the Law of Forfeiture for Treason, by the intolerable Grievances, which once arose from
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from it, thro' their Means, when the Causes of Grievance are removed, both by a Change of Persons, and the Reformation of Laws, gain Indemnity to their rash Followers, by the Abolition of it?

To sum up the Whole of the Argument in a few Words: If we consider this Law with a partial View to temporary Convenience and Necessity, it may be said, that as, in the military Art, it is held dangerous to vary the Order of Battle, whilst the Enemy is in Sight; so, in Civil Prudence, to take away Constitutional Safeguards, when the Evil to be prevented advances with large Steps, and is at hand. If we consider it with a general View to the everlasting Rules of Truth and Justice (which differ in Name, rather than Reality, the one being in Speculation what the other is in Practice), it seems consonant to all our natural and best-grounded Notions. If we consider it with a general View to Policy and Freedom, we find it so limited in *Great Britain*, as that, for the future, neither a weak Prince can exert it wantonly, nor a base one oppressively; at the same time that it has all the Force which either a
wise

wise Monarch can make use of, or a virtuous can desire. In a Word it is peculiarly fitted to the *British* Constitution, and to this Period of its Duration : it is without Intricacy, or Cruelty : not formed on slavish or exotic Models, but on Truth, Justice, Policy, and Freedom ; those sacred Principles, which inspire Moral Conduct ; plan, administer, preserve Civil Government ; and, being united, are the Wisdom, the Power, and the Majesty, of all Ages.

July 1, 1747.

*A DISCOURSE on the Construction
of a Clause relating to Forfeitures
in Scotland, in the Statute of the
Seventh of Queen Anne, c. 21.
intituled, An Act for improving
the Union of the two Kingdoms.*

WHAT follows is designed to examine an
Opinion of great Moment to the Argu-
ment of the Book ; and it is hoped therefore
will not be thought an impertinent Addition
to it. The Opinion is, That, by the general
Words of the Act of the Seventh of Q.
Anne, the strict Tailzies, or Tailzies with
prohibitive, irritant, and resolute Clauses
annexed, are not made liable to Forfeiture
for Treason. If this Opinion be just, it
makes the former Part of the Appendix
entirely unnecessary, by taking away the
Ground

Ground of the Difficulty, which is attempted to be solved in it. But that Consequence were indeed a Trifle; and, altho' it might induce the Writer to consider the Opinion, yet he must suggest other Consequences of more Importance to engage the Attention of the Reader. In this Instance, such Inducements to Attention are not wanting: for, supposing the Opinion to be well grounded, it may be affirmed to have a direct Tendency to destroy the Effect and Operation of that very material Clause, in the Act for improving the Union, relative to Forfeiture in *Scotland*; and to draw along with it all those Inconveniencies, which, it has already been shewn, must follow, in a Course of Time, upon the Exemption of strict Tailzies from the Law of Forfeiture.

In Support of the Opinion, it may be argued, 1. That the Act having barely said, *the Forfeitures for Treason in Scotland shall be the same as in England*, it can never be intended, that a Man shall forfeit in *Scotland* by virtue of that Act what he cannot alienate, or charge with Debt; this being inconsistent with the Rules of the Law of *England*,

land, which is now made the Standard of Forfeiture throughout the united Kingdom. Hence a Tenant under a strict Tailzie, not having the Power to break the Entail, is in Effect not seised of the Inheritance; and, merely enjoying the Profits of the Land during his Life, would be considered in an *English* Court of Law or Equity, not as a Tenant in Tail, but a Tenant for Life only; and consequently unable to forfeit for his Heirs.

2. It may be argued, That as the general Words (taken by themselves) will not include these Tailzies; so neither will the Proviso by Way of Exception, in favour of the particular Tenants under strict Tailzies, who shall happen to have married before the Day named in the Act, put a Construction upon those general Words, as if the Parliament designed to comprehend all other Cases within them. For tho' an Exception of one Case confirms the general Rule in Cases not excepted; yet that can never hold where the general Rule is not laid down in such a Manner, as that it would have included the Case excepted, supposing the Exception had not been made. And therefore the Proviso can only be considered as inserted for greater Caution, since the due Construc-

tion of the Statute would have been the same without it. This is clear Reasoning, and either to be answered, or submitted to.

The Rule laid down in the Statute is, That *all Persons convicted or attainted of High Treason in Scotland, shall be subject to the same Forfeitures as in England.*

The general Question arising under it is this; Whether a Person seised of an Estate-Tail affected with prohibitive, irritant, and resolute Causes, committing Treason, is liable to forfeit the Estate-Tail, otherwise than for his own Life, within the Meaning of that Rule?

And the Resolution of the general Question will depend upon two particular Questions:

1. Whether the Forfeiture of Estates-Tailzie in *Scotland*, with such Clauses annexed, can be considered, and upon what Grounds, as analogous to, or the same with, the Forfeiture of Estates-Tail in *England*? If it be so, then the Rule laid down is sufficient to include the Case of these Tailzies.

2. Sup-

2. Supposing the Rule sufficient to include this Case, Whether the whole Frame of the Statute of the Seventh of *Q. Anne* does not furnish Arguments to shew the Forfeiture of these Tailzies clearly within the View and Intention of the Legislature?

At the same Time it shall be admitted, that if the Words which express the general Rule will not bear this Sense, according to legal Construction, and the Reason and Analogy of the Law of *England*, Arguments from the probable or manifest Intention of the Statute are of no Moment. But if the Words will bear it, it must likewise be admitted, that Arguments of that Kind come in with the greatest Weight.

I. The first Question is, Whether the Forfeiture of Estates-Tailzie in *Scotland*, with such Clauses annexed, can be considered, and upon what Grounds, as analogous to, or the same with, the Forfeiture of Estates-Tail in *England*?

The Consideration of the first Objection to the Construction of the Act contended
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for in this Discourse falls in here; *viz.* That the Tenant under strict Tailzie, being without Power to alienate, has not an Estate of Inheritance, but merely an Estate for Life; and therefore ought not to forfeit to the Prejudice of his Posterity. In *England*, the Estate of Tenant in Tail is an Estate of Inheritance; as such, subject to his Alienation; and, by consequence, to Forfeiture.

In order to treat this Question clearly, and answer the Objection thus stated, and connected with it; it will be proper to distribute what may occur upon it into the following Propositions; and to shew,

1. That the alienable Quality annexed to some Species of Inheritance in *England*, is not an essential Property (or a *sine quâ non*) of Estates of Inheritance, upon the Notions of the Law of *England*.

2. That the Estate of Tenant under a strict Tailzie, restrained as he is from Alienation, is an Estate of Inheritance.

3. That the annexing of that alienable Quality to some Species of Inheritance, is
not

not the adequate or principal Cause of exposing them to Forfeiture, upon the Notions of the Law of *England*.

4. That the Want of that Quality in other Species of Inheritance, is not the adequate or principal Cause of exempting them from Forfeiture.

5. That in the framing and construing of the Statutes, under which the Forfeiture of Estates-Tail was introduced, the alienable Quality annexed to any Species of Inheritance made liable by the Words of them, has not been considered as the sole Ground, or just Measure, of that Forfeiture.

6. As a Consequence from the Whole, That the Estate of Tenant under strict Tailzie, is, by virtue of the Statute of the Seventh of *Queen Anne*, included within the Words and Meaning of those Statutes, under which Estates-Tail have been adjudged forfeitable in *England*.

1. And as to the First Point: There is no Proposition more clear and indisputable than this, that the only Thing essential to an

Estate of Inheritance, (and indeed, which makes the Definition of it,) is its Quality of descending to Heirs. A Fee-Simple, and a Fee-Tail, are two different Species of Inheritance; and, considered merely as such, the essential Property of the one is, that it does *transire in hæredes quoscunque*; the essential Property of the other is, that it does *transire tantùm in hæredes designatos*. And since it is contended, that the Tenant under a strict Tailzie wants the principal Flower of the Inheritance, which is the absolute Power over it, of alienating the Land, and defeating the Settlement; it may not be amiss to examine the Question with some Exactness, Whether the Power of alienating can be regarded in any Light upon the Notions of the Law of *England*, as an essential Property of an Estate of Inheritance: and this will evidently appear to be otherwise, upon considering the Nature and Properties of several Species of Inheritance allowed in *England*. Ecclesiastical Persons, such as a Bishop, or an Abbot, being sole Corporations, or Dean and Chapter, Master and Fellows, being Corporations aggregate, have a Fee or Inheritance in them, tho' they cannot alienate: and, in consequence of it,

it, they might at Common Law maintain several Writs and Forms of Suit, peculiar to a Tenant in Fee-Simple or Fee-Tail. In like Manner, Fee-Simples conditional, at Common Law, were understood to be Estates of Inheritance, even before Issue had, whilst the Tenant had no Power to aliene. For the Fee or Inheritance was not taken to be in Abeyance till Issue had, that is, till the Condition performed; because the Condition being subsequent, the Estate was vested. It is said in Lord *Berkeley's* Case, reported in **Plowden's* Commentaries, that the bare Words of the Limitation to the Tenant, and the Heirs of his Body, made the Estate of greater Account in the Eye of the Law, that an Estate for Life, and intituled to various Privileges and Advantages. Hence it was, that even if he had aliened before Issue had, the Donor should not enter for the Forfeiture, as he might upon the Feoffment of a Tenant for Life: neither could the Donor have a Writ of Error upon an erroneous Recovery against him, as he might against the Tenant for Life; nor a Writ of *ad Terminum qui præterit*, if the Donee died without Issue, but a *Formedon in rever-*

* Plowd. fol. 241.

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* *Plowd. fol. 241.*

ter, against the Person to whom the Donee alienated; and singly for this Reason, because at the Time of his Alienation, he stood seised of an Estate of Inheritance. In the Case of Estates-Tail created by the Statute *de Donis*, which were not only unalienable, like Fee-Simples conditional before Issue had, but even after, the Law still regarded the Tenant as seised of an Estate of Inheritance, and gave him many Privileges over a Tenant for Life. He was, from the Time of making that Statute, allowed to be dispunishable of Waste: the Wife of a Donee in Tail was entitled to Dower, and the Husband of a Woman Donee in Tail might be Tenant by the Courtesy: He might suffer a common Recovery, and, in respect of the supposed Recompence against the Vouchee, the Issue was bound. If he aliened with lineal Warranty, leaving Affets; or if, being disseised of his Estate, he accepted the Grant of a Rent-charge, proportionable to the Value of the Right, in Consideration of a Release to be made by him to the Disseisor: in either Case the Issue was bound. He is likewise intitled to many Actions and Remedies for the Rights incident to his Estate, which

which the Tenant for Life is not. And altho' he be restrained from alienating to the Prejudice of his Issue, or those in Remainder or Reversion; yet his Feoffment of Lands and Tenements should only make a Discontinuance, and put the Issue in Tail, to his Action, after the Death of Tenant in Tail, where the Feoffment of the Tenant for Life would create a Forfeiture, and give the Remainderman an immediate Entry*. So likewise, Conditions which are good to bind the Estate of Tenant for Life, are void to bind the Tenant in Tail. If a Man makes a Gift in Tail, upon Condition that the Tenant shall not make a Lease for Term of his own Life, it is void. But if he makes a Lease for Life, upon Condition that the Lessee shall not demise the Land for his Term, it is good. For, at Common Law, such Lessee might commit Waste *ad Excæredationem* of the Lessor: and, on that Account, the Lessor was understood to take particular Care, whom he chose for his Lessee, and to repose a Confidence in him, which he could not be supposed to have in a Stranger. And this Restraint he was allowed to put upon the Estate of Tenant

* Sir *Anthony Mildmay's* Case, 6 Co.

for Life, for the Benefit of his own Inheritance. But when a Man makes a Gift in Tail, and by Consequence the Donee Owner of the Inheritance, the Law will not suffer him to be restrained from such Acts as are consistent with his Estate, and such Pre-eminences as the Law allows it *. At present indeed the Tenant in Tail has other Incidents annexed to his Estate, by the Statutes of the 4th of *Henry* the Seventh, and the 32d of *Henry* the Eighth, which did not belong to it by the Statute *de Donis*. Under the general Words of the Statute of *Henry* the Seventh, by which it is enacted, *that every Person may levy a Fine*, he has a Power conferred upon him of barring his own Issue by the Operation of a Fine. Under the Statute of *Henry* the Eighth, he is enabled to make Leases for 21 Years, or three Lives. And the Parliament having thus shewn themselves weary of Perpetuities, and declared their Sense, Common Recoveries came more frequently in Use. The Judges no longer supported them by such Reasonings only, as tended to a collusive Evasion of the Statute *de Donis*, drawn from the supposed Compensation for

* *Mary Porlington's Case*, 10 Co.

breaking

breaking the Entail to be made to those who claimed under it ; but upon the plain Policy of suppressing a public Inconvenience: they grew bolder in applauding the Subtilty of their Predecessors, who invented that Fiction of Law, and called it the common Assurance of the Realm. So that now the Tenant in Tail became possessed of a complete Power of Alienation by Fine and Recovery, which are as much his ordinary Conveyances, as a Feoffment is of Tenant in Fee-Simple. But it is plain (and upon this Point the whole Weight of the Proposition rests) that, however the Law gives many Privileges to Estates in Fee-Simple and Fee-Tail, as Inheritances, to set them above Estates for Life ; yet the alienable Quality annexed to such Estates was at no Time thought an essential Property of them, without which they were not Inheritances. Was it ever thought, that Estates-Tail created by the Crown, with Reversion in the Crown, pursuant to the 34th of *Henry* the Eighth, lost any Thing of their inheritable Quality, because, in consequence of that Statute, they were unalienable by Fine or Recovery ? Or rather, was not that inheritable Quality better preserved for the Benefit of the Heirs
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of the Body, according to the Limitation of the Gift? Besides, when Attempts have been made in Family Settlements, to add restrictive and penal Clauses to the Estate of Tenant in Tail, to prevent him from alienating, the Judges have said they were repugnant to the Nature of an Estate-Tail. But they never argued thus; That, because to alienate was an essential Property of Estates of Inheritance, therefore to bind him from alienating was repugnant to the Nature of his Estate, considered merely as an Inheritance, and turned it into an Estate for Life. Certainly that never was the Argument. In considering the Effect these Clauses would have upon it, as an Estate of Inheritance, they applied themselves to reason in another Manner. They observed, in the penal Part of these Clauses, it was expressed, that upon an Alienation, or Attempt to alienate, by Tenant in Tail, his Estate should cease, as if such Person were naturally dead; and the Person, who would be Heir or Remainderman on his Death, should immediately enter*. Now they said, this Clause or Condition was contrary to the Words and Meaning of the original Limitation.

* *Corbet's Case*, 1 Co.

1. Because the Estate of Tenant in Tail is not determinable on his Death alone, but on his Death without Issue; for, by the express Limitation, he has an Estate of Inheritance, which by Possibility may last forever. And therefore, if a Man makes a Gift in Tail, upon Condition, that, if the Tenant dies, his Estate shall cease, and the Donor re-enter, 'tis void; and if Tenant in Tail be disseised, and a Descent cast, or if he discontinue, and then die without Issue, the Donor cannot re-enter for the Condition broken: because, tho' the Estate-Tail, by Accident on the Death of the Tenant, ceased for want of Issue, yet the Condition was repugnant at the Time of creating the Estate.

2. They said, it was repugnant to the Nature of an Estate-Tail, as an Estate of Inheritance, because every Limitation or Condition annexed to it must defeat the whole Estate, and not Part of it; nor can make it cease as to one Person, and continue as to another. If that could be, then this Absurdity would follow, that the Issue inheritable to the Estate-Tail might take by Descent in the Life-time of his Father, and the Remainderman or Reversioner enter in the Life of Tenant in Tail; which, by the Rule
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and Policy of the Common Law, cannot be, unless there be first either a Natural or Civil Death. It is true indeed, that, by Act of Parliament, an Estate of Inheritance may be made to cease as to one Person, as if the Party were naturally dead. This was the known Case of a Wife Tenant in Tail Jointress. By the Stat. 11 *Hen.* 7. if she discontinued the Estate by Feoffment, the Person to whom it should belong after her Death had an immediate Entry given him*. In which Case, the Issue comes in, as Heir in Tail, and *quasi* by Descent, even in the Life of Tenant in Tail†, of the very same Estate and Right, which was in the Mother. This Case is irregular, and created by Statute. But, tho' the Legislature may be safely intrusted with this Discretion to be exercised for the public Good, the Common Law will not endure any private Man by his Deed to annex such Conditions and Limitations to Estates; since it might tend not only to destroy the legal Qualities of them, but those Rules of Political Wisdom, by which they are framed and established.

* *Hobart*, 337, 338.

† 1 *Inst.* 326. (b).

It is plain therefore in general, that the alienable Quality, annexed to some Species of Inheritance, cannot be understood to be an essential Property of Estates of Inheritance, and consequently not an essential Property of an Estate-Tail, considered merely as an Estate of Inheritance, upon the Notions of the Law of *England*.

2. The next Proposition is to shew, that the Estate of Tenant under a Tailzie with prohibitive, irritant, and resolute Clauses annexed, is an Estate of Inheritance. But it may be said, that such Estate is barely an Estate for Life; or, if it be any more, at most it but resembles the Estate of Tenant in Tail after Possibility of Issue extinct, who, tho' he has many Incidents and Privileges of the Fee, yet being unable to alienate, cannot forfeit.—These Cases differ widely. For the Tenant in Tail after Possibility of Issue extinct, has no Estate of Inheritance, and is only indulged in these Privileges*, as *Littleton* expresses it, for the Sake of the Inheritance that was once in him. His Estate must determine with his own Life; because the Gift was to him, and his Wife

* 1 *Inst.* 28. (b).

the joint Donee, and the Issue of that Marriage, in Tail-Special ; the Hopes of which may be extinguished by the Death of either of the Parties. But the Estate of Tenant under strict Tailzie is in Nature of an Estate in Tail General, which may by Possibility continue for ever. For, 1. In the first place, the Limitation of the Estate is expressly made to him, and the Heirs of his Body. 2. In the next place, his Heirs, tho' they claim by Purchase, as under the Gift and Intention of the Donor, and may at their Election serve in the Land as Heirs of Entail to the Donor, yet they claim likewise by Descent, and generally serve as Heirs to the Ancestor ; unless it be for the sake of avoiding intermediate Acts. And hence it is laid down by Sir *G. Mackenzie*, in his Institute of the Law of *Scotland**, that generally, in all the Cases of these Tailzies, the Tenant in Tail, who contravenes the Provisions contained in them, prejudices not only himself, but the Heirs of his Body, who might otherwise succeed by him. This too is said to follow in Judgment of Law, without any express Declaration for that Purpose in the Settlement. Now, although this Opinion may

* *B. 3. Tit. 8.*

be a mistaken one (as it has since been held), and taking it, that the Heirs of the Body mentioned in the Tailzie are not prejudged by the Acts of the Ancestor, unless it be declared so in the Tailzie; yet whenever it is so declared, the Equity and Reason of that Declaration is grounded on the Connexion between the Ancestor and Heir, and supposes a Derivation through him. But if he were to be considered as Tenant for Life only, those Heirs would claim wholly by Purchase, and in Remainder, as Substitutes.

3. If no Provision be made by way of Jointure for the Wife, in a tailzied Settlement, or if the Tailzie be limited to Females as well as Males, so as that a Woman might be Heir of Tailzie (Things in Fact seldom or never happening; yet the Supposition is sufficient to shew the Consequence of Law); it must be admitted in the one Case, that the Wife would be entitled to Dower, and in the other, the Husband might be Tenant by the Courtesy. And where these two Rights are incident to any Estate, they are infallible Marks of an Inheritance. 4. Whenever a Tenant in Tail, or Member of a Settlement in Possession, incurs an Irritancy, the Remainderman or Substitute has no di-

rect Entry upon the Estate, and cannot immediately serve as Heir in the Lands, but must sue out a Declarator of Irritancy ; which is another Mark of the Inheritance, and is exactly analogous to the Law of *England* ; according to which, the Tenant in Tail, alienating by Feoffment, inconsistently with the Nature of his Estate, gives the Issue in Tail, or Remainderman, a Right of Action, after the Death of Tenant in Tail, but no Entry ; tho', in the Case of Tenant for Life ; a Forfeiture by wrongful Alienation entitles the Reversioner to an immediate Entry. 5. The Tenant under strict Tailzie has some Privileges, which greatly exceed the Privileges of an Estate for Life. As for Instance : He has a discretionary Power to cut Timber, without Impeachment of Waste, implied in the very Nature of his Estate-Tail ; whereas the Tenant for Life has no such Power, unless it be in plain Words given him by the Grant. Indeed, the Tenant in Tail after Possibility of Issue extinct, has likewise this Power, by virtue of his Estate, for the Reason which has been mentioned. But, 6. The Tenant under strict Tailzie has Powers, which greatly exceed those enjoyed by the Tenant in Tail after Possibility of Issue extinct, and more nearly affect

affect the absolute Property of the Land. He may create Charges for the Advantage of the Donor's Memory : he may raise a Sum of Money by Mortgage to pay off the Donor's Debts, or for the Maintenance and Improvement of the Estate. In like Manner, if he should happen to be taken Captive in War, or unjustly imprisoned till the Payment of a Fine exacted from him, he may incumber the Land, either to ransom himself from the Enemy, or discharge the Fine. So that the Powers of the Tenant under a strict Tailzie, in these Instances, amount to the Ownership, or at least a very great Command over it. And tho' they are not to be exercised according to his Humour, but upon the best Reason and most deliberate Judgment, what is done by virtue of them will ever be regarded favourably in a Court of Justice. From all this it follows, that the Estate of Tenant under a strict Tailzie, is an Estate of Inheritance; that it is entitled, by reason of its inheritable Quality, to many Privileges and Advantages beyond the Estate of Tenant for Life, tho' there be no complete Power of Alienation inherent in it, or annexed to it.

3. But it will be objected, admitting that this Power of Alienation is not an essential Property of Estates of Inheritance ; yet still the annexing of this Power to Estates in Fee-Simple absolute, and Fee-Tail, is the single Ground of Equity, or the adequate Cause for which they are adjudged forfeitable. And this was so in the Case of the *English* Estates-Tail, which were protected from Forfeiture when made unalienable, and were exposed to it as soon as they became alienable.

The Third Proposition lays down the contrary Doctrine, and will be illustrated by the Answer to this Objection. And the Answer is, That it is very true, the Colour for exempting the Estate of Tenant in Tail from Forfeiture, was the Operation of the Statute *de Donis*, by which Fee-Simples conditional, or Estates-Tail at Common Law *, originally alienable *post Prolem suscitam*, were made unalienable for the Benefit of the Issue †. But it may justly be called a Colour only, because, according to Lord *Hobart's* Opinion (which has already been ‡ alluded to), it is most probable the Framers

* *Hobart, Sheffield v. Radcliffe*, 340.

† *V. autem* 2 *Inst.* 335. 1 *Inst.* 347 (b).

‡ *V. p.* 154.

of that Statute thought at first of nothing more than preventing the Alienation of Estates-Tail by Grant or Sale. And perhaps it was not agreeable to the strict Rules of Law, to take away the Right of the Crown to the Forfeiture of such Estates, merely by Implication and Construction. However, when the Statute of *Henry* the Seventh gave the Tenant a Power to bar his Issue by Fine, and the Practice of suffering Recoveries gained every Day new Strength and Credit; then his Estate being again made alienable, this Colour of Exemption was removed. But when once it was removed, other Reasons of Justice and Policy for reviving the Forfeiture (which have already been explained at large in the foregoing Treatise) resumed their ancient Force: And tho' the taking away of that Colour gave Occasion to revive it, it was plainly the least Reason for establishing it. This appears from the Complaints so often repeated in the *English* Law Books by the wisest Men of those Times, that the Exemption of Estates-Tail from Forfeiture gave the greatest Encouragement to Treason, and to every Kind of public Mischief and Confusion. There is likewise a further Answer to this

Objection, arising from the Case of Estates-Tail created by the Crown, which, tho' unalienable, are forfeitable, and the Interest of the Issue is disregarded, notwithstanding the Tenant in Tail can enjoy only for his own Life, without Powers over the absolute Property of the Estate.

4. But it will be insisted, that the Answers are not sufficient to take off the Weight of the Objection: For that the Notion of Law is truly laid down in that Objection, and may be made appear from other Species of Inheritance, in which the Want of this alienable Quality is the adequate Cause of exempting them from Forfeiture upon the Reason of the Law of *England* *. Such was the Case of Tenant in Fee-Simple conditional till Issue had; and of the Husband seized of an Inheritance by his Wife; and such also was the Case of Ecclesiastical Persons, at the Common Law. Now, from considering each of these Instances distinctly, the Fourth Proposition may be illustrated; *viz.* That the Want of this Quality in other Species of Inheritance is not the adequate or principal Cause of exempting them from Forfeiture.

* *V. 1 Inst. 327 (b). 2 Inst. 335.*

And,

And, 1st, As to Fee-Simples conditional, it is clear that the Restraint laid upon Alienation*, was imposed wholly out of Regard to the immediate Prospect or Possibility of the Donor's Reversion, whilst the Tenant had no Issue; since, as to the Interest of the Issue, no Attention was had to it; and, from the first Instant of the Gift, he might aliene or forfeit to their future Prejudice †. The Tenant therefore was not disabled to forfeit merely on this Ground of Equity, because he could not aliene. For had it been so, the Benefit of that Equity would have been extended to the Issue born after the Alienation of the Ancestor; and the Common Law must have given him a *Formedon in Descender*, as it did to the Donor *in Reverter*. But the Ground of his Disability was plainly this: Because the Estate having been given upon Condition, whenever the Condition was not performed, the Donor might re-enter; which Re-entry would have been prejudiced by Forfeiture as much as by any other Kind of Alienation. In the Case of strict Tailzies, the Exemption from Forfeiture was not only in Favour of the Donor, as in the Case of Fee-Simples conditional, but of the Donee's Issue; the latter of whom

* 2 *Inst.* 335.† 1 *Inst.* 19 (a).

is not favoured in *England*, either by the Common or Statute Law in Cases of Treason; and the Interest of the former is at this Day expressly saved in the Statutes of *Henry* the Eighth, in like Manner as at the Common Law.

2. In the next place, as to the Estate of the Husband seised of an Inheritance by his Wife, it is a Fee-Simple qualified: And since every Fee-Simple, whether absolute, conditional, or qualified, is considered as equally great, and included under the same general Definition, it is called, in *Littleton's* Words, *Hæreditas legitima vel pura*. But tho', in respect to the Wife, it is strictly an Estate of Inheritance, as being vested in her, and having the Quality of descending to her Heirs; yet, in respect to the Husband, it is so only *abusivè*, or in an improper Sense, because it is impossible, that it should descend at any Time to his Heirs. He is said indeed to be seised of such Estate, as he ought to join with his Wife in every Act, which is an Exercise of the Right, and in every Remedy pursued for a Wrong done to it: All which is consequent upon the Notion of Law in respect to the Power of the Husband, and the Incapacity of the Wife during the

the Coverture. Before the Stat. 32 *Hen.* 8. his Fine or Feoffment was a Discontinuance of the Estate; and neither the Wife or her Heir could enter upon the Discontinuee, as they now can by virtue of that Statute, but was put to recover the Right by Action. This likewise is considered in Law as a principal Mark or Privilege of the Inheritance. In a Word therefore, the true Ground why this Estate is forfeitable only during the Coverture, or for Life of the Husband, and not for the whole Fee *in perpetuum*, is not because it is unalienable by the Husband, but because it is an Inheritance in an improper Sense: It is not a durable Estate, which, as is said of Estates in Fee-absolute, or Estates-Tail, may by Possibility continue for ever. Were it descendible to Heirs claiming under him, who cannot set aside, or enter in Prejudice to, what the Ancestor has done, and generally suffer by his wrong Acts, there would be a just Ground for the Policy of Law to operate very differently, and, by reason of the natural Connexions and Ties of Blood, which have the strongest Effect on the Minds of Men, to expose the Estate to Forfeiture, whether alienable or not in any other Manner. But on that Point enough has been already said.

3. In

3. In the last place, as to Ecclesiastical Persons, their Case is much altered by the Statutes of *Q. Elizabeth* and *K. James*; but it is proper for the present Purpose to consider it at Common Law, for the sake of arguing by Analogy from the Reason of it. And it is clear, that a Bishop was always taken to be seised of the Fee and Inheritance of the Tenements belonging to his Church *. He might maintain a Writ of Right upon that Foundation, and had no Occasion in a real Action to pray in Aid of the King, as in the Case of Tenant for Life, who shall have Aid of the Reversioner, in whom the Fee resides. He might make a Discontinuance by his Alienation, though he could not absolutely convey away the Lands, without the Assent of the Chapter. But still this imperfect Power of Alienation is not the Ground, or at least not in this, any more than in the other Cases which have just been considered, the complete and adequate Reason why he could not forfeit the Inheritance for Treason. The great Reasons seem to be these: 1. Because the Estate does not descend to his Heirs, but is taken in Succession by Persons to be chosen and ap-

* 1 *Inst* 341 (b). 342 (a).

pointed to the See, upon his Decease or Translation. And therefore the Ground, both of legal Privity, and natural Connexion between the Ancestor and Heir, fails in this Case, between the Predecessor and the Successor. 2. Because to suppose the Inheritance forfeitable, would not only be no Check on the Possessor, as he can be presumed to have little Tendernefs or Concern for those who might succeed him, to whom he is a Stranger, but detrimental to the State, as the Revenues are appropriated to the See, to support the Dignity of the Bishop, for the sake of Order and Government. And consequently, to expose the Inheritance to Forfeiture for Treason, would be to make one Part of the public Policy of the Kingdom invade and destroy another. As to the Case of a Parson or a Vicar, it is still stronger, not only as the same Reasons hold in that Case, but as they cannot maintain a Writ of Right, nor discontinue; the Right of the Fee or Inheritance not being in them, but in perpetual Abeyance, that is, in the Remembrance, Intendment, and Consideration of Law, for the Benefit of the Church, and the Succession in it.

5. The next Proposition is, That in the framing and construing of the Statutes, under which the Forfeiture of Estates-Tail was introduced, the alienable Quality annexed to any Species of Inheritance, made liable by the Words of them, has not been considered as the sole Ground, or just Measure, of that Forfeiture.

The Words of the Statute 26 *H.* 8. by which Estates-Tail have been adjudged forfeitable in Cases of Treason, are these:—
 “ And be it further enacted, that every
 “ Offender and Offenders, being hereafter
 “ lawfully convict of any manner of High-
 “ Treasons by Presentment, &c. according
 “ to the due Course, &c. *shall lose and for-*
 “ *feit to the King's Highness, his Heirs*
 “ *and Successors, all such Lands, Tenements,*
 “ *and Hereditaments, which any such Of-*
 “ *fender or Offenders shall have of any Es-*
 “ *tate of Inheritance in Use or Possession,*
 “ *by any Right, Title, or Means,* within
 “ this Realm, or elsewhere within any
 “ of the King's Dominions, at the Time
 “ of any such Treason committed, or any
 “ Time after : Saving to every Person, &c.
 “ other than the Offenders, their Heirs and
 “ Successors, &c. all such Rights, &c.” It
 is

is clear from these Words, that the Intention of Parliament was to vindicate the Policy of the Common Law, as to Forfeiture in Treason, from the subtile Innovations which had been made upon it, by Feoffments to Uses, and the Construction of the Statute *de Donis*; in consequence of which, the greater Part of the Inheritances in *England* grew, in a Course of Time, to be exempted from it. The Judges pursued this Intention, and it never admitted of a Doubt, in explaining this Law, whether every Kind of Inheritance was not included in it *. It has been said indeed, in construing the Statute of *Præmunire*, 16 Ric. 2. c. 5. that the Words which enact, the Offender's *Lands and Tenements, Goods and Chattels, shall be forfeit to the King*, do not extend to forfeit an Estate-Tail, otherwise than for his Life. But that Construction was made, because such general Words were not thought sufficient to repeal the Effect of the † Statute *de Donis*, as to the Right of the Issue in Tail: And besides, neither was the Offence of equal Malignity with High Treason; nor are the Expressions of Parliament so peremp-

* 1 Inst. 130 (a).

† Jenkins. Cents. 28.

tory,

tory, as in the 26 *H. 8.* and at, &c. It has been said too, in construing other Statutes of Forfeiture, that the Words, *all Inheritances*, will not comprehend Estates-Tail; which is a much stronger Case of favourable Construction than that of the Stat. of *Præmunire*, both because the Reasons to support it are not so weighty, and the Words more emphatical *. The Ground of it seems to be this; That when the Word *Inheritance* is used absolutely by itself, especially in the forfeiting Clause of a penal Statute, which is not to be extended by Equity beyond the Letter, it shall be understood only of an Inheritance of the highest Kind, that is, of a Fee-Simple absolute. But when it is said, that the Offender shall *forfeit all Lands and Hereditaments of any Estate of Inheritance, which he shall have by any Right, Title, or Means*, it is, as if the Parliament had said, all Kinds or Species of Inheritance. Now it is plain, from the Construction of this Statute, that the Judges have thus expounded it, without regarding whether those Inheritances were alienable or not, at the Pleasure of the immediate Possessor, by the Operation of other Statutes or of the Common Law. Indeed, had this alienable

* But *Qu.* of this for, &c.

Quality been an essential Property of Estates of Inheritance, then no Estate or Interest, which could not be alienated by the Party longer than for the Term of his own Life, would have been affected by the Words, because such an Estate would not have been an Inheritance : Or, had the annexing of this alienable Quality to any Estate of Inheritance, been considered as the legal Ground and Measure of Forfeiture, the Judges could not have construed the Statute in the Manner they have done, consistently with the Rules of Law. The Construction they have made upon it is reducible to these Points :
1. It was taken to be clear, that Estates-Tail were forfeited by the express Words, being Estates of Inheritance. 2. In the next place, the Statute having declared, that *any* Estate of Inheritance, of which the Offender was seised by *any* Right, should be forfeited for Treason, it was understood, that Bishops, being sole Corporations, in whom the Fee or Inheritance of their Lands was vested, were comprehended within the Words. And, 3. The Husband seised in Right of his Wife, being seised of an Inheritance, was understood to forfeit by the same Words, in Prejudice to her, and her Heirs. After some time

this Forfeiture was thought too extensive; because a Bishop was barely seised of the Inheritance in his politic Capacity, to maintain the Dignity and Revenues of his See, for the public Service: And the Husband had only temporary Powers over it during the Coverture, to be exercised in Conjunction with his Wife. For these Reasons, in the Act of the 1st of Queen *Mary*, for attainting *Cranmer* Archbishop of *Canterbury*, particular Care was taken to save the Inheritance of the See from Forfeiture, for the Benefit of his Successors *; and by Construction of the Stat. 5 and 6 *Edw. 6. c. 11.* the Inheritance of the Wife was saved, notwithstanding the Attainder of the Husband; and a Remedy applied to all Cases of the like Nature for the future. The Clause of Forfeiture in that Statute is conceived nearly in the same Terms with that of the 26 *H. 8.* but, instead of *any Estate of Inheritance*, which the Offender shall have *by any Right*, the Words are, *any Estate of Inheritance* which the Offender shall have *in his own Right*. But the Force of the Argument is not affected by this Variation in the Statutes; because every

* *V. Hale's Hist. Pl. Cor. 1 Vol. C. touching Forfeiture for Treason.*

Estate of Inheritance, called so in a proper Sense, that is, every Estate which a Man may transmit in Course of Descent to his Heirs, general or special, by Act and Favour of Law, is still forfeitable within the Words, whether alienable or not in any other Way. And it seems equally fitting, that every Estate of Inheritance, improperly so called, should not be forfeitable, as has been shewn at large under the Fourth Proposition. In a Word, The Statute of *Henry* the 8th, and that of *Edward* the 6th, seem both to aim at the same general End, of pursuing the true Reason, and restoring the ancient Policy, of the Common Law.

It being thus established, that a Power to alienate is not an essential Property of an Estate of Inheritance, considered at large ; or supposing it to be (as it is) a Power or Quality annexed to some Species of Inheritance, that it is not the Reason or Measure of adjudging them liable to Forfeiture ; the Consequence follows, that Estates in Fee-Simple and Fee-Tail are not liable to it, because they have that Power or Quality inherent in them, or annexed to them, but because they are Estates of Inheritance. The

Law has connected the Interest of the Ancestor and Heir: It has chosen the Heir from the nearest in Blood to him: It subjects the Heir in almost all Instances to his Acts; and the strongest Tie upon the Ancestor is supposed to arise from his presumed natural Partiality to that Heir. And therefore it is a Fallacy to argue from the alienable instead of the inheritable Quality of the Estate to the forfeitable Nature of it. It happens indeed in *England* (except in the special Case, under the Statute of the 34th of *Henry* the 8th, of Estates-Tail created by the Crown), the Law knows no Estate of Inheritance properly so called, which is not subject to a complete Power of Alienation. That is owing to its disallowing every Limitation of Estates, which tends to make them Perpetuities; and is not the Reason or Measure in this Case. The Common Law of Forfeiture for Treason stands upon larger Maxims of Policy, and a nobler Ground of Equity.

6. Therefore, sixthly, in the last place, the Consequence is plain and indisputable, that the Estate of Tenant under strict Tailzie, being an Estate of Inheritance, in the most strict and proper Sense, and enjoyed by the
Tenant

Tenant in his own Right, is included, by virtue of the Statute of Queen *Anne*, within the Words and Meaning of the Statutes of *Henry* the 8th, and *Edward* the 6th, and must be adjudged forfeitable by the Rule of the Law of *England*.

II. The Second Question is, supposing the Rule sufficient to include this Case, Whether the whole Frame of the Statute of Queen *Anne* does not furnish Arguments to shew the Forfeiture of these Tailzies clearly within the View and Intention of the Legislature?

As to the Sufficiency of the Rule, it seems evident from what has been already offered, that when an Act of Parliament says, the Forfeitures in *Scotland* shall be the *same* as in *England*, that is, shall be adjudged and determined by the Law of *England*, the Estate of Tenant under strict Tailzie must be liable within the Reason and Meaning of that Law.

The Consideration of the Second Objection to this Construction of the Act falls under this Question, and proceeds on a contrary Supposition to it; *viz.* that the Rule

is insufficiently expressed, and in very loose and general Words; and then it draws a Consequence, that no Arguments from Provisoos or Exceptions annexed to it, or from the Frame of the Statute, can be of any Moment to explain and establish it. But it must now be taken in the Course of this Argument, that the general Rule is clearly settled, and shewn to be expressed in Terms sufficient to include the Case of these Tailzies; and therefore it will be neither impertinent or premature to argue from the Frame of the Statute, by which the Sense and Intention of it will appear more strongly. For Arguments of this Kind being drawn, as Lord *Coke* expresses it, *ex visceribus actûs*, are always the most clear and satisfactory in the Exposition of Laws; because they receive their Weight not from extrinsic Reasonings, but the Testimony of the Thing itself.

The Preamble sets forth, That “ nothing
 “ can more conduce towards improving the
 “ Union of the two Kingdoms, than that
 “ the Laws of both Parts of *Great Britain*
 “ should agree as near as may be; especially
 “ those Laws which relate to High Treason,
 “ and the Proceedings thereupon, as to the
 “ Nature

“ Nature of the Crime, the Method of
“ Prosecution and Trial, and also the For-
“ feitures and Punishment for that Offence,
“ which are of the greatest Concern both to
“ the Crown and to the Subject.”

It appears from this Preamble, the Parliament understood, that, previous to this Act, the Laws of *England* and *Scotland* did not agree in the several Particulars recited in it, of which Forfeiture is one. It appears too, that they designed to bring the Law of Treason in both Kingdoms to a Conformity; and, by consequence, to make some new Law in every one of those Particulars.

Then the Act proceeds to enact, that the Description of the Crime, and the Method of Trial and Proceeding, shall, in many Instances, be referred to the Law of *England*, as the Standard; and, after Clauses for those Purposes, it enacts, That “ all Persons convicted or attainted of High Treason in
“ *Scotland*, shall be subject and liable to the
“ same Corruption of Blood, Pains, Penalties, and Forfeitures, as Persons convicted
“ or attainted of High Treason in *England*.”

Upon this Clause it is observable, 1. That the Words enact, not declare; therefore, according to the proper Language of the Statute-Book, they are to be supposed introductive of some new Law.

2. These Words have no Effect or Operation at all, unless the Case of the Tailzies with irritant and resolute Clauses be comprehended in them. The Act of 1690, made in the *Scotch* Parliament (so often mentioned in the former Part of the Appendix *), is penned in such a Manner, as clearly to leave all other Species of Tailzie, and Estates of Inheritance, except the strict Tailzies, liable to Forfeiture, in like Manner as they were antecedent to it. Therefore, when it is enacted, that Forfeitures in *Scotland* shall be the *same* as in *England*, the Words have no other Estate of Inheritance, or Case of Forfeiture, to operate upon. And it is not to be supposed, that the Parliament, in making a Law of this Consequence, could insert a Clause absolutely vain and nugatory; and that relative to a Matter, which is, in

* *V. p. 172.*

the Preamble, emphatically declared to be of the greatest Concern both to the Crown and to the Subject.

After these Words comes the Provifo by way of Exception; which is of itself fufficient to prove the Rule, expound this Act, and fhew the manifefit Intention of the Law-makers.

“ Provided always, That where any Per-
“ fon now is, or fhall be feifed, before the
“ faid First Day of *July*, of any Meffuages,
“ Lands, Seignories, Rents, Tenements, or
“ Hereditaments in *Scotland*, of an Eftate-
“ Tail; that is to fay, an Eftate-Tailzie, af-
“ fected with irritant and refolutive or pro-
“ hibitive Claufes; and is, or before the faid
“ First Day of *July* fhall be, married; if
“ any Ifsue of that Marriage be living, or
“ there be Poffibility of fuch Ifsue at the
“ Time of the High Treafon committed;
“ that then, in fuch Cafe, the faid Meff-
“ fuages, &c. fhall not be forfeited upon the
“ Attainder of fuch Perfon (but during the
“ Life of the Perfon fo attainted only); fo
“ that the Ifsue and Heirs in Tail of fuch
“ Marriage fhall inherit the fame.”

This is plainly an Exception out of the Rule, and an Evidence of what they understood to be included in it. It was inserted out of Tendernefs to fuch as had actually contracted in Marriage at that Time, in Confidence of Settlements fo framed, and who might reasonably be prefumed to have been influenced, in many Inftances, by the Nature and Qualities of thofe Settlements. Thus the Act explains itfelf: and tho' it muft be confidered in this Part of it as a penal Law; yet, in every Law, even of a penal Kind, the Intention muft be the Rule in conftruing the Words; and out of both controuling one another, the fureft Conftruction will arife.

Another Argument of the View and Intention of the Legislature may be drawn from a Circumftance appearing upon the Journals of the Houfe of Lords. And tho' it would be of little Weight in a Court of Law, where Judges muft frame their Opinion upon confidering the Act alone, or comparing it with other Acts of Parliament, and the general Rules of Law; yet, in a Difcourfe of this Kind, the Reader will not be difpleafed with the Mention of it, the better

better to inform and satisfy his private Conscience. The Circumstance is no more than this. Several Lords, who debated against the Bill, and especially this Part of it, entered their Protest against it; and, in one of the Reasons assigned, it appears how the Clause in question was designed and understood at the Time of framing it. For express Notice is taken, That * “ the Proviso
“ in the Act relating to Marriage-Settlements
“ is only a Share of the Provision made for
“ the Subject in respect to Forfeitures at the
“ Revolution.” These Words plainly allude to the *Scotch* Act of 1690, and intimate, that the general enacting Clause was meant to repeal the Effect of it, as to the strict Tailzies.

But it may be objected, It is a Rule of Law in expounding Statutes, that where a Statute constitutes a new Law, and there be none before *in eâdem Materiâ* to the contrary; in that Case the Statute, being in the Affirmative, may imply a Negative: But where a former Law to the contrary was in force before it, in that Case the former is not taken away by implying a Negative in

* *Prot. in H. of Lords, 28 Mart. 1709.*

an Affirmative. In the present Instance, a former Law, the Act of 1690, exempted these strict Tailzies from Forfeiture. The Act of the 7th of *Q. Anne* is expressed only in general Words affirmatively, that the Forfeitures in *Scotland* shall be the same as in *England*, without any negative Words, or exprefs Repeal of the Act of 1690.

In answer to this Objection, it may be suggested,

1. If it be meant by the Rule for expounding Statutes, that Acts of Parliament shall not be repealed by strained Inferences or Implications, 'tis clearly right; but, carried further, cannot be agreeable to Law, because it is not agreeable to the common Understanding of Mankind. For, however many Rules and Maxims of Law are artificial, and in themselves were indifferent, till they became established; yet all Rules of Construction are founded in Nature and Reason, and have nothing in them merely positive and arbitrary.

2. Secondly, This Rule is always applied where the two Laws may have their respec-

tive Operation, and consist together. Hence it is, that Remedies of Suit given by Statute, where the Statute is only in the Affirmative, do not take away those Remedies, which are given by the Common Law, but the Party has his Election. The Statute, which has directed Fines to be levied with Proclamations, has not annulled the Effect of Fines, which are levied as at Common Law. But this Clause in the Statute of the 7th of *Q. Anne* will have no Operation at all (as has already been observed), unless it be understood virtually to repeal the Act of 1690, as to the Exemption of strict Tailzies from Forfeiture. Therefore, altho' the Clause be affirmative only, and the Act of 1690 likewise affirmative; and the Rule be, that affirmative Acts of Parliament regularly do not abolish precedent Acts affirmative; yet in the present Instance, the two Laws are contrary in their Matter and Effect; and the latter implies a strong and necessary Negative. Cases of this Kind are not unfrequent in the Law of *England*, and shew the Limitations with which the general Rule must be received. To mention one or two will be sufficient for Illustration. By the Stat. 33 *H. 8. c. 23.* it is enacted, that
if

if any Person, being examined before the King's Council, or any Three of them, shall confess any Treason, Misprision, or Murder, or be vehemently suspected by them, he shall be tried in any County where the King pleases, by his Commission, &c. And afterwards, in the 1 & 2 *Ph. & Mar. c. 10.* another Law was made in these Words: That all Trials hereafter to be had for any Treason, shall be had according to the Course of the Common Law, and not otherwise. Now it is agreed in Dr. *Foster's Case**, by the Court, in Argument, that altho' the negative Words had not been inserted, yet the last Act had abrogated the former, because they were directly contrary in Matter. But that Act, notwithstanding the negative Words, does not abrogate the Statute of the 35 *H. 8. c. 2.* concerning Trials of Treason committed beyond Sea, because it is not contrary in Matter; such Treasons not being originally triable at the Common Law. In like manner the Stat. 1 *Edw. 6.* which vested all Chauntries in the King, tho' it be in the affirmative, has virtually taken away that Remedy, which is given by the Stat. *Westm. 2. c. 41.* to the Donors, and their

* 11 *Co. 63. (a).*

Heirs, against the Donees, who shall neglect to perform the Service required, in an Action of *Cessavit de Cantariâ*.

3. But the Construction contended for not only leaves the Law without Effect; it contradicts the Words, as well as disappoints the End. It is enacted, that Forfeitures shall be the *same* in *Scotland* as they are in *England*; that is, governed by the same Rule. But Forfeitures will not be the same in both Countries, unless the strict Tailzies are adjudged forfeitable*. The Rule of Law in *England* is, not that all Lands, in which the Traitor has *this* or *that* particular *Mode* of Inheritance, shall be forfeited; but it is, that all Lands, in which he has *any* Estate of Inheritance, in his own Right, shall be forfeited. The Offender seised under a strict Tailzie has an Estate of Inheritance in his own Right, tho' some of the Clauses annexed to the Limitation of it are of a peculiar Nature not allowed in *England*. But if, by Act of Parliament in succeeding Times, it could be supposed probable, that such Estates of Inheritance, restrained as to the Power of alienating, might take place in

* Qu. Whether Estates, &c.?

England,

England, there would be no Occasion to enact or declare them forfeitable. They would be comprehended within the general Words of the Statutes of *Hen.* the 8th, and *Edw.* the 6th. Thus stands the Case of the Tenant under a strict Tailzie, whose Estate seems clearly liable to Forfeiture for Treason, as an Estate of Inheritance: Unless we can imagine, that the restrictive Clauses annexed to the Limitation of his Estate have destroyed the inheritable Nature of it, altho' they were designed by the Inventors, allowed by Judges, and confirmed by Parliament, for the more effectual Preservation of it.

THE END.



